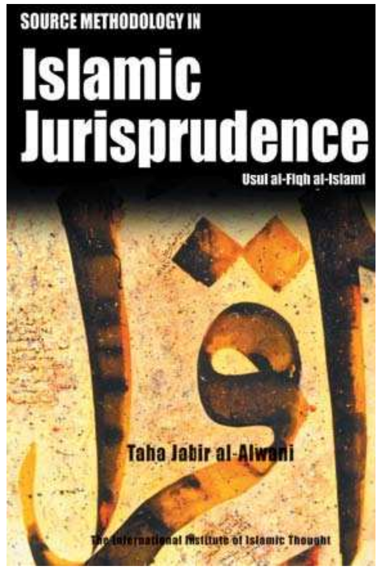


In the Name of Allah.
the Compassionate, the Merciful,
Praise be to Allah, Lord of the Universe,
and Peace and Prayers be upon
His Final Prophet and Messenger

USUL AL FIQH AL ISLAMI

SOURCE METHODOLOGY IN ISLAMIC JURISPRUDENCE:

Methodology for Research and Knowledge

Taha Jabir Al 'Alwani

English Edition by

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The International Institute of Islamic Thought
Herndon, Virginia USA

Research Monographs No. (1)

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The International Institute of Islamic Thought

ISBN 0-912463-56-2

Dedication

We present this study to those Muslim youth who are searching for a ray of light in the deepest darkness that surrounds us, and who are seeking a solution and a way out of the crisis that currently overwhelms us; in the hope that it may be of benefit to them, *in Sha'a Allah*.

A Word From the Editors

Legal studies in any language pose problems to authors and readers alike. In translation, those same problems are compounded, even many times over at some places in the text, so that quite often the result is, to say the least, disappointing. Unfortunately, with regard to English translations of classical works of the Islamic intellectual heritage, this sort of disappointment has been the rule rather than the exception.

Certainly, to the student of *Usul al Fiqh* this disappointment has been all the more acute. While translations of classical works in the field are non-existent, with the shining exception of professor Khadduri's excellent rendition of al Imam al Shafi'i's *Risalah*, there is as yet no general and systematic study of the discipline in English. Even survey literature on the subject is scarce.

Yet, despite this near desperate situation, the International Institute of Islamic Thought has not published the present volume merely in order to fill a void in the library. Rather, it is in recognition of the dynamics of intellectual reform, and of the role of Ijtihad in that process, that the Institute is undertaking to publish a series of works by its President, Dr. Taha Jabir al 'Alwani, on the subject of *al Usul* and, in particular, Ijtihad.

This volume should be understood as an overview of the field, and as an introduction to the classical discipline. Subsequent volumes, however, will, *In Sha'a Allah*, present much that is original, and even vital. For it is the conviction of the Institute that the source methodology developed by the scholars of *al Usul* for dealing with and interpreting the texts of the Qur'an and Sunnah is what now needs to be placed before our Muslim social scientists so that they, with this important and versatile tool in hand, may proceed to fashion the outlines of a new relevancy for Islam.

Certainly, for our part, we can only hope that we have succeeded in making the text clear. Moreover, we have taken pains to include a full Subject Index, with the help of Cindex version 4.0 software, that should prove useful to specialist and generalist alike. Also, while the Arabic edition of this book was published with topic headings, it was not divided into chapters. In the interest of clarity, we have divided the work into chapters by converting, where necessary, topic headings into chapter headings; and by adding brief explanatory notes. May Allah give His guidance to the Ummah of Muhammad (PBUH).

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Jumada al Akhirah 1411 AH
December 1990 AC

Introduction

The research for this work originally formed part of the studies I undertook in Islamic Jurisprudence for the doctoral program at Al Azhar University in 1392/1973. On the occasion of the Second International Conference on Islamic Thought, held in Islamabad, Pakistan in 1402/1982 on the subject of the "Islamization of Knowledge", material from this thesis was presented in a revised form.

When the League of Muslim Youth expressed their desire to hold a course on *Usul al Fiqh* "Source Methodology in Islamic Jurisprudence", the material for this study formed one of the six subjects covered in the course. Then, as many of those who attended the course expressed a wish to obtain the lectures in printed form, and as the study was already being printed as one of the papers for the Islamabad Conference on the Islamization of Knowledge, which the International Institute of Islamic Thought will soon be publishing(*), *In Sha'a Allah*, we decided to take this opportunity to present this part of the Conference material to those who attended the course and to others who may wish to gain knowledge of this essential science of Shari'ah.

The science of *Usul al Fiqh* is rightly considered to be the most important method of research ever devised by Muslim Thought. Indeed, as the solid foundation upon which all the Islamic disciplines are based, *Usul al Fiqh* not only benefited Islamic civilization but contributed to the intellectual enrichment of world civilization as a whole. It will not be out of place to note here that the methods of analogical developed within the framework of Islamic jurisprudence constituted the methodological starting-point for the establishment and construction of empiricism, which in turn is considered to be the basis of contemporary civilization.

We present this brief work to all who are interested in gaining some knowledge of this science; and we ask Allah *Ta'ala* to help us benefit from what we learn, and to learn that which will benefit us, and to protect us from knowledge that is not beneficial, and from deeds that are not acceptable to Him. *Wa Akhiru Da'wana an al Hamdu Lillah Rabb al 'Alamin*! (All praise and thanksgiving belong to Allah, the Lord and Sustainer of all the worlds!)

Dr. Taha Jabir al Alwani, President, International Institute of Islamic Thought

Herndon, Virginia
Dhu al Hijjah 1408 AH
July 1988

(*) The edited proceedings of the Islamabad Conference were published by the Institute as volume number 5 in the Islamization of Knowledge Series, and is entitled *ISLAM: Source and Purpose of Knowledge*.

CHAPTER ONE

USUL AL FIQH: METHODOLOGY FOR RESEARCH AND KNOWLEDGE IN ISLAMIC JURISPRUDENCE

Definition:

The science of Source Methodology in Islamic Jurisprudence *Usul al Fiqh* has been defined as the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to certain knowledge of a Shari'ah ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer.[1]

Subject Matter:

As its subject matter, this science deals with the proofs in the Shari'ah source-texts, viewing them from the perspective of how, by means of Ijtihad, legal judgements are derived from their particulars; though after, in cases where texts may appear mutually contradictory, preference has been established.[2]

Benefit:

The science of *Usul al Fiqh* engenders the ability to have knowledge of Shari'ah rulings through study, on the part of those qualified to perform Ijtihad and who meet all its requirements, of the legal proofs revealed in the sources by the Lawgiver.

The benefit to be had from this science to those not qualified to perform Ijtihad is that, through their study of the classical schools of legal thought *madhahib* of the *mujtahidun* (those who practise Ijtihad) and the reasoning behind their rulings, the student of Source Methodology in Islamic Jurisprudence is enabled to understand the various schools of thought, to analyze them, to choose from among their interpretations and assign preference, and to adduce legal arguments on the basis of the principles formulated by the classical *mujtahidun*.

THE SCIENCES FROM WHICH USUL AL FIQH DERIVED ITS ACADEMIC BASIS

The science of *Usul al Fiqh* is in fact an independent and autonomous field. It is, however, based on certain fundamental predications *muqaddamat*, knowledge of which the Islamic legal scholar cannot do without. These predications have been derived from several other disciplines:

a. Some are derived from the science of Aristotelian logic which the philosopher-theologian writers *mutakallimun* had become accustomed to discussing in the introductions to their works. These academic discussions dealt, for example, with the ways in which words convey meanings, the division of subjects into present and predicable, the need for, and varieties of, discourse depending on conceptual principles taken from interpretations and definitions, the validity of conclusions based on inductive reasoning, and discussions about evidence and how it may be used to prove the claims of the one who is adducing it, or to refute contradictions, and so on.

b. Some are derived from *Ilm al Kalam* Scholastic Theology, and include discussions of such questions as the nature of the Sovereign *Hakim*, in the sense of whether it is the Shari'ah itself or reason which decides what is right and what is wrong; or such as whether one can have knowledge of right and wrong before revelation; or such as whether rendering thanks to the Bounteous Creator is a duty derived from the Shari'ah or from human reasoning.

c. Some are general linguistic rules which the scholars of *al Usul* developed through linguistic research and presented in a crystallized form, such as research dealing with languages and their origins, the classification of words into metaphorical and literal, discussions of etymology, synonymity, emphasis, generalization, specification, the meanings of grammatical particles and so on.

d. Some are derived from the classical sciences of the Qur'an and the Sunnah, such as discussions concerning the transmission of Hadith by a single narrator *Ahad*, or by an impeccable plurality of narrators *Tawatur*, the non-standard recitations of the Qur'an and the rules about them, the criteria for the acceptance *Ta'dil* or rejection *Jarh* of narrators of Hadith, abrogation of legislation *al Nasikh wa al Mansukh*3, the condition of the text of a Hadith and its chain of narrators, and so on.

e. Finally, the examples cited by the scholars of *al Usul* in illustration of their arguments are derived from the specifics of Fiqh, and from the detailed evidence for the same as taken from the Qur'an and the Sunnah.

The issues with which the scholars of al Usul are primarily concerned include the following:

- Logic and its predications
- Linguistics
- Commands and Prohibitions
- Comprehensive *al 'Amm* and Particular terms *al Khass*
- Inconclusive *al Mujmall* and Determined concepts *al Mubayyan*
- Abrogation *al Naskh*
- Deeds (in particular, those of the Prophet, upon whom be
- peace, and their significance)
- Consensus *al Ijma'*
- Narrations relating to the Sunnan
- Analogical reasoning *al Qiyas*
- Indicating preference in cases of apparent contradiction
- Exercising legal acumen and scholarship Ijtihad
- Following a specific school of legal thought *Taqlid*
- Disputed Sources (those other than the four "agreed" sources)

ORIGINS AND DEVELOPMENT OF USUL AL FIQH

It is difficult to attempt a study of *Usul al Fiqh* and its development without considering the history of Fiqh, the practical precepts of Shari'ah that have been gleaned from detailed source-evidence.

The lexical meaning of Usul is foundation, or basis *Asl*; plural *Usul* or that upon which something else is built. In the legal system of Islam, Fiqh is built upon and stems from the bases *Usul* which constitute its source-evidence. Hence, in order to understand the origins of *Usul al Fiqh*, we need to have a general idea of the history of Islamic legislation *Tashri'*.

Establishing Shari'ah legislation, prescribing law, laying down rules and regulations, and defining systems is a function which is specific to Allah alone. Anyone who presumes to ascribe these functions to any other than Allah commits the sin of *al Shirk*, as, in doing so, he has effectively contradicted the belief in the Oneness of Allah *Tawhid*.

Allah has provided articulate proofs and clear source-evidence in order that the believers should have no trouble in finding their way to the particulars of His legislation, or *Ahkam*. with reference to some of this source-evidence, the Islamic Ummah has agreed on its validity and its relevance to the *Ahkam*, and has accepted it as such. However there are differences with regard to other source-evidence.

The source-evidence upon which the whole Ummah fully agrees, and on the validity of which there is general consensus, comprises the two sources that formed the basis of legislation at the time of the Prophet (PBUH). These two sources of legislation are:

1. The Qur'an: This may be defined as the words revealed to the Prophet (PBUH) the recitation of which itself constitutes an act of worship, the shortest *Surah* of which is a challenge to mankind to produce anything the like thereof, every letter of which has been transmitted to us via an indisputably authentic chain

of authority *Tawatur*; which is written between the two covers of the Holy Book *Mushaf* beginning with *Surat al Fatihah* "The Opening Chapter" and ending with the *Surat al Nas*.

2. The Sunnah: This includes everything, other than the Qur'an, which has been transmitted from the Prophet(PBUH); what he said, did, and agreed to.

Thus, every utterance of the Prophet (PBUH), apart from the Qur'an, and his every deed, from the beginning of his mission to the last moment of his life, constitute his Sunnah, in the general sense of the word, whether these establish a ruling which is generally applicable to all members of the Ummah, or a ruling which applies only to the Prophet himself or to some of his *Sahabah*.

Regardless of whether what the Prophet (PBUH) did was instinctive or otherwise, his every word, deed and approval may be taken as the basis for evidence in a legal ruling. This is so regardless of whether his utterances or actions related to matters of faith or practice, or whether they were concerned with commanding or recommending, prohibiting, disapproving, or allowing; and regardless of whether his word or action was based on a ruling previously revealed in the Qur'an, or whether it served independently to establish legislation.

During the lifetime of the Prophet (PBUH), all the legal rulings *Ahkam* of the Shari'ah, inclusive of all of its classifications, such as principal and derived rulings, teachings on the fundaments of the faith, and regulations regarding personal practice and legalities, were derived from these two sources, the Qur'an and the Sunnah.

3. Ijtihad was practiced by the Prophet (PBUH) and by those of his companions with legal proclivities *Ahl al Nazar*. The Prophet's Ijtihad was sometimes confirmed by the Qur'an and sometimes not; in which case it was explained that the better solution was other than that which he had adopted.

The Ijtihad made by the Companions was always in response to situations which actually occurred to them. Later, when they met the Prophet (PBUH), they would explain what happened and tell him what they had decided. Sometimes he (PBUH) approved of their Ijtihad, and such decisions of theirs (having gained the approval of the Prophet) became a part of the Sunnah. If he (PBUH) disapproved of their Ijtihad, his explanation of the correct procedure would become the Sunnah.

Thus, we can say that at that stage legislation depended on the two forms of Divine revelation *Wahy*:

1. Recited revelation *Wahy Matlu*; or the Qur'an with its absolute inimitability *I'jaz*
2. Non-recited revelation *Wahy Ghayr Matlu*; or the Sunnah of the Prophet (PBUH)

Indeed, the Ijtihad made by the Prophet (PBUH) set a precedent for his *Sahabah* and later Muslims, that clearly proved the legitimacy of Ijtihad, so that when they could not find an express legal ruling in the Qur'an or Sunnah, they were to make use of Ijtihad in order to arrive at a judgement on their own.

Moreover; probably to reinforce and establish this concept, the Prophet (PBUH) used to order certain of his Companions to make Ijtihad concerning certain matters in his presence. Then he would tell them who was correct and who was mistaken.

METHODS FOR DERIVING RULINGS FROM THE SOURCES

As to the Qur'an..

The Qur'an was learned and understood by the *Sahabah* without their ever having recourse to formal rules of grammar. Likewise, endowed as they were with clear vision, sharp wits and common sense, they readily understood the aims of the Lawgiver and the wisdom behind His legislation.

Indeed, the *Sahabah* rarely used to question the Prophet (PBUH) about any matter unless he himself mentioned it first.

It is reported that Ibn Abbas said: "I have never seen any people better than the *Sahabah* of the Prophet, may Allah bless him and grant him peace. Throughout his mission, until he passed away, they only asked him about thirteen matters, all of which are mentioned in the Qur'an. For example, [the meaning of]: *'They ask you about fighting in the sacred month...'* (2:212); and *'They ask you about the menstruating woman...'* (2:222)" Ibn Abbas said, "They only asked him about matters which were of actual concern to them."4

Ibn 'Umar said in this respect: "Don't ask about something that hasn't happened, for I heard my father, 'Umar ibn al Khattab, curse one who asked about something which had not occurred."5

Qasim said (to the third generation of Muslims): "You ask about things we never asked about, and quarrel about things we never quarrelled about. You even ask about things which I'm not familiar with; but if we did know, it would not be permitted for us to remain silent concerning them."6

Ibn Ishaq said: "I met more of the Prophet's *Sahabah* than anyone else did; and I have never seen a people who lived more simply, or who were less demanding on themselves."7

'Ubadah ibn Nusay al Kindi said: "I have known a people whose austerity was not as rigid as yours, and whose questions were quite other than the ones you ask."8

Abu 'Ubaydah said in his book *Majaz al Qur'an*: "It has never been reported that any of the Sahabah went to the Prophet (PBUH) for knowledge of anything which could be found in the Qur'an."9

As to the Sunnah...

The parts of the Sunnah which consist of the Prophet's words were in the Companions' own language, so they knew its meaning and understood its phrases and context.

As far as the Prophet's deeds were concerned, they used to witness them, then tell others exactly what they had seen. For example, hundreds of people saw the Prophet (PBUH) making ablutions *Wudu'* and then adopted his practice without asking him about details; like which of the various actions in *Wudu'* were obligatory and which were recommended, which were merely allowed and which were not. Likewise, they witnessed him (PBUH) performing *Hajj* and *Salah*, and the other acts of worship.

People were heard asking the Prophet (PBUH) to give *Fatawa* concerning various matters, and he did so. Cases were referred to him, and he would pronounce his judgement. Problems would arise amongst the *Sahabah*, and he would give a definite answer; whether the problems concerned mutual relations, personal conduct, or various political matters. They witnessed all these situations and they understood the context in which they took place, so that the wisdom and purposes of the Prophets judgements were not hidden from them.

People also saw how the Prophet (PBUH) used to notice the conduct of his *Sahabah* and others. Thus, if he (PBUH) praised anybody, they knew that the person's act had been a good one; and if he (PBUH) criticized anybody, they knew that there had been something wrong with what the person had done.

Moreover, all the reports concerning the Prophet's *Fatawa*, rulings, decisions and approval or disapproval of various matters indicate that they took place in the presence of many people. So, just as the colleagues of a doctor know, due to their long association and experience10, the reasons for his prescribing certain medicines, so also the *Sahabah* of the Prophet (PBUH) knew exactly the reasoning behind his decisions.

As to Ijtihad...

The indications that Ijtihad is valid and relevant in the contemporary context are many. For example, Mu'adh ibn Jabal states that when the Prophet (PBUH) sent him to Yemen, he asked:

"what will you do if a matter is referred to you for judgement?" Mu'adh said: "I will judge according to the Book of Allah." The Prophet asked: "what if you find no solution in the Book of Allah?" Mu'adh said: "Then I will judge by the Sunnah of the Prophet." The Prophet asked: "And what if you do not find it in the Sunnah of

the Prophet?" Mu'adh said: "Then I will make Ijtihad to formulate my own judgement." The Prophet patted Mu'adh's chest and said "Praise be to Allah who has guided the messenger of His Prophet to that which pleases Him and His Prophet."11

This Ijtihad and forming of one's own judgement, as mentioned by Mu'adh, is further explained in the advice 'Umar gave to Abu Musa when he appointed him a judge: "Judgement is to be passed on the basis of express Qur'anic imperatives or established Sunnah practices.." Then he added:

"Make sure that you understand clearly every case, that is brought to you for which there is no applicable text of the Qur'an or the Sunnah. Yours, then, is a role of comparison and analogy, so as to distinguish similarities -in order to reach a judgement that seems nearest to justice and best in the sight of Allah."12

Consequently, al Imam al Shafi'i explained "opinion" as meaning Ijtihad, and Ijtihad as meaning *al Qiyas*. He said: "They are two names for the same thing."13

Abu Bakr al Siddiq, *Khalifat Rasul Allah*, said: "As far as the Prophet is concerned, his opinion was always correct because Allah always guided him. In our case, however, we opine and we conjecture."14

Thus, we may state that the concept of Ijtihid or "opinion", at that stage, went no further than one of the following:

a. Applying one or another of the possible meanings in cases where a sentence may lend itself to two or more interpretations, e.g. when the Prophet (PBUH) ordered the Muslims to pray among Banu Qurayzah.15

b. Comparative *Qiyas*; which deals with a matter by comparing it with another, similar matter which is dealt with in the Qur'an or Sunnah. For example, the *Qiyas* of 'Ammar who compared the case of Tayammum when in a state of *Janabah* to *Ghusl*, and therefore rubbed his whole body with dust.16

c. Ijtihad by taking into account something which is potentially beneficial; or prohibiting something which could lead to wrongdoing; or deriving a particular ruling from general statements; or adopting a specific interpretation; and so on.

The extent of the Prophet's concern with encouraging the *Sahabah* to make Ijtihad and training them in its use can be seen in his saying "When a judge makes Ijtihad and reaches a correct conclusion, he receives a double reward; and if his conclusion is incorrect, he still receives a reward."17

The Ijtihad of many of the *Sahabah* was so accurate that in many cases the revelations of the Qur'an confirmed it, and the Prophet (PBUH) supported it. Obviously, their close association with the Prophet (PBUH) had afforded them a keen sense of the aims of the All-wise Lawgiver, of the basic purposes behind the Qur'anic legislation, and of the meanings of the texts; opportunities which those who came after them did not directly enjoy.

CHAPTER TWO

THE SAHABAH WHO GAVE FATAWA DURING THE PROPHET'S LIFETIME

The Sahabah who gave *Fatawa* in the Prophet's lifetime were: Abu Bakr, 'Uthmtan, 'Ali, 'Abd al Rahman ibn 'Awf, Abd Allah ibn Mas'ud, Ubay ibn Kab, Mu'adh ibn Jabal, Ammar ibn Yasir, Hudhayfah ibn al Yaman, Zayd ibn Thabit, Abu al Darda, Abu Musa al Ash'ari and Salman al Farisi, may Allah be pleased with them.

Some *Sahabah* gave more Fatawa than others. Those who gave the most Fatawa were: 'Aishah Umm al Mu'minin, 'Umar ibn al Khattab and his son Abd Allah, 'Ali ibn Abu Talib, Abd Allah ibn Abbas and Zayd ibn Thabit. The *Fatawa* given by any one of these six would fill a great volume. For example, Abu Bakr Muhammad ibn Musa ibn Ya'qub ibn al Khalifah Ma'mun collected the *Fatawa* of Ibn Abbas in twenty volumes.

Those from whom a lesser number of *Fatawa* were narrated are: Umm Salmah Umm al Mu'minin, Anas ibn Malik, Abu Sa'id al Khudri, Abu Hurayrah, 'Uthman ibn 'Affan, Abd Allah ibn Amr ibn al 'As, 'Abd Allah ibn Zubayr, Abu Musa al Ash'ari, Sa'd ibn Abu Waqqas, Salman al Farisi, Jabir ibn Abd Allah, Mu'adh ibn Jabal and Abu Bakr al Siddiq. The *Fatawa* of each of these thirteen would fill only a small part of a book.

To this list can be added Talhah, al Zubayr, 'Abd al Rahman ibn Awf, 'Imra-n ibn Husayn, Abu Bakrah, 'Ubadah ibn al Samit and Mu'awiyah ibn Abu Sufyan. The rest gave only a few *Fatawa*, and only one or two, in some instances more, have been transmitted from any of them. Their *Fatawa* could be collected into a small volume, but only after much research and sifting through texts[18].

In preparing their *Fatawa* the *Sahabah* used to compare the particulars of events that had happened to them with similar matters for which judgments had been given in the texts of the Qur'an and the Sunnah. In thus referring the matter to the sources, they employed the method of looking for the meaning and legal significance through examination of the text's literal wording, its implications, and any other relevant details.

Having arrived at a decision, they would then explain to others how they had adduced the arguments that led them to their judgments, whether these had been derived from the letter of the text or from its spirit, and the people would follow them. Indeed, these early Muslim jurists never stopped researching a question until they reached a decision they felt certain of, and until they were completely satisfied that they had done their best and could do no more.

THE ERA OF THE GREAT SAHABAH

After the time of the Noble Prophet (PBUH) came the era of the Great *Sahabah* and the Rightly Guided Caliphs *Khulafa' Rashidun* . This period lasted from 11 to 40 AH. The Reciters *Qurra'* was the term used at the time to denote those *Sahabah* who had a good understanding of *Fiqh* and gave *Fatawa*.

THE TIME OF ABU BAKR AL SIDDIQ

Maymun ibn Mahran summed up Abu Bakr's method of arriving at legal judgments as follows:

Whenever a dispute was referred to him, Abu Bakr used to look in the Qur'an; if he found something according to which he could pass a judgment, he did so. If he could not find a solution in the Qur'an, but remembered some relevant aspect of the Prophet's Sunnah, he would judge according to that. If he could find nothing in the Sunnah, he would go and say to the Muslims: 'Such and such a dispute has been referred to me. Do any of you know anything in the Prophet's Sunnah according to which judgment may be passed?'. If someone was able to answer his question and provide relevant information, Abu Bakr would say: 'Praise be to Allah Who has enabled some of us to remember what they have learnt from our Prophet.' If he could not find any solution in the Sunnah, then he would gather the leaders and elite of the people and consult with them. If they agreed on a matter then he passed judgment on that basis.[19]

If all the methods mentioned above failed to produce any result, then he would make Ijtihad and form his own opinion, either by interpreting a text in such a way as its legal implications became apparent, or by exercising his own legal acumen.

An example of Ijtihad of the first kind was when he was asked about the *Kalalah*. In response, Abu Bakr said: "My opinion, if it is correct, then it is from Allah, and if it is wrong, then it is from myself and from the *Shaytan*. The *Kalalah* is one who has neither ascendants nor descendants."20

Another example of the same was the instance when 'Umar mentioned to him the following Hadith of the Prophet (PBUH): "I have been commanded to wage war against people until they say that there is no god but Allah..."21, and Abu Bakr said, "*Zakah* is a part of it."22

When Abu Bakr wanted to wage war against those who were withholding *Zakah*, 'Umar cited this Hadith to show that fighting them was not permitted, because the Prophet had said: "...until they say that there is no god but Allah. Then, if they say this, their blood and their wealth will be spared by me, except where due by right (ie. unless they do acts that are punishable in accordance with the Shari'ah of Islam).

According to 'Umar, these acts were: adultery, murder, and apostasy; since withholding *Zakah* was not expressly mentioned by the Prophet (PBUH). But Abu Bakr said to him: "*Zakah* is a part of it. By Allah, I would fight anyone who performed *Salah* but did not pay *Zakah*! If anyone were to withhold from me even the smallest amount they used to pay to the Prophet, I would go to war with them over it."

An example of the second type of Ijtihad was when he decided that the mother's mother may inherit, but the father's mother may not.

Some of the Ansar said to him: "You allow a woman to inherit from the deceased, while he would not inherit from her if she were the deceased. And you have left with nothing the woman from whom he would inherit were the situation reversed." Abu Bakr then decided that both maternal and paternal grandmothers would share one-sixth of the inheritance.

Another example is his judgment that everyone should receive an equal share from the public treasury. 'Umar asked him: "How can you consider one who entered Islam with misgivings to be equal to one who left his home and wealth behind, and migrated to be with the Prophet?" Abu Bakr, however, insisted that: "They all entered Islam for the sake of Allah, and their reward is with Him; this world is nothing." when, however, 'Umar became the *Khalifah*, he differentiated between people and paid the "stipend" according to how early each person had entered Islam, whether they had migrated, and how much they had suffered for the sake of Islam.

Another example of Abu Bakr's exercise of Ijtihad was when he compared the appointment by the *Khalifah* of his own successor, to the appointment by means of *Bay'ah*. Thus, he appointed 'Umar to be the *Khalifah* after him, and the *Sahabah* agreed with him.

Khalid ibn al Walid wrote to Abu Bakr, telling him that in some areas of the Arabian Peninsula he had found men engaging in homosexual practices. Abu Bakr decided to consult the *Sahabah* of the Prophet (PBUH) as to what he should do about it. One of the *Sahabah* was 'Ali, and his was the strictest judgment.

He said, "his sin was known only in one nation, and you know what Allah did to them. I suggest that these people should be burnt to death."

Abu Bakr wrote back to Khalid to tell him that they should be burnt to death; and this was done.23

SPECIAL FEATURES OF FIQH IN THE PERIOD

a. The use of *al Qiyas* was widespread in cases where there was no relevant text in the Qur'an or Sunnah and none of the *Sahabah* objected to this.

b. *Al Ijma'* was also widely used as a basis for judgment. This was facilitated by the fact that the *Sahabah* were few, and it was easy for them to agree amongst themselves. They used *al Ijma'*

in many cases; for example, their decisions that the *Khalifah* or Imam should be appointed, that apostates should be fought and killed, that an apostate could not be taken as a prisoner of war, and that the Qur'an should be collected and written down in one volume.

THE TIME OF 'UMAR IBN AL KHATTAB

'Umar's recommendations to the judge, Shurayh, as mentioned above, explain his way of deriving judgments from the available evidence. The most noticeable feature of 'Umar's methodology, however, is the fact that he often consulted the *Sahabah* and discussed matters with them so as to reach the best understanding and find the most appropriate way to carry out judgments. In his approach to questions of legalities, 'Umar was like a shrewd and cautious chemist whose intent is to produce medicine that will cure disease without causing adverse side effects.

As a result, 'Umar left us a great wealth of jurisprudence. Ibrahim al Nakha'i (d.97 AH) said that when 'Umar was martyred, "nine-tenths of all knowledge disappeared with him.24

Ibn Mas'ud said of him, "whatever path 'Umar chose, we found it easy to follow."25

'Umar's understanding was comprehensive and he was possessed with good common sense. Thus, he was quick to relate the particular to the general, and could pursue the ramifications of an issue back to basic principles in order to see its wider implications. This is how he was during the time of the Prophet (PBUH) and Abu Bakr, and he did not change when he himself became the *Khalifah*.

'Umar learnt a great deal from the Prophet (PBUH). He often noticed that the Prophet would refrain from issuing an order to the people to do something good, although he wanted to do so, because he did not want to subject them to hardship. He (PBUH) often used to say: "If it were not that I am afraid to impose hardship on my Ummah, I would have commanded them to do... such and such."26

Sometimes he would forbid them to do certain things, and then, when he saw that the reason for forbidding them was no longer valid, he would lift the ban. On other occasions, he would be about to forbid something, and they would tell him of the hardship and distress that such a prohibition would cause them, so he would refrain from it so as to protect them from hardship.

'Umar saw how the Prophet (PBUH), whenever he was faced with a choice between two things, would always choose the easier of the two; and this had a great effect on 'Umar. Indeed, he well understood that the Shari'ah has purposes and aims which must be discerned and considered; and that there are grounds for, and reasons behind, these judgments; some of which are made clear in the primary texts while others are only alluded to. He felt it the duty of scholars to discover those reasons which are not specified in the texts, so that legal judgments may be applied to new issues and developments, and everything brought under the judgment of Allah so that people will not become accustomed to seeking remedies and legal rulings on their problems outside the law of Allah.

Hence, when we look at 'Umar's practice of Ijtihad, we will find clear methods of arriving at judgments. Anyone who studies his *Fatawa* will readily see that the reasoning behind them is based on the public interest, on taking precautions to prevent wrong-doing or to combat corruption, and on adopting the easiest and most expedient course under the law.

'Umar, for example, declared some judgments invalid because the reasons for enforcing them no longer applied, or because some of the conditions for following them no longer prevailed. Among those judgments: his request to the Prophet (PBUH) that the prisoners of the battle of *Badr* should be killed; his suggestions about *Hijab*, and that the Prophet (PBUH) should not tell the people that whoever said "there is no god but Allah" would enter Paradise, in case they relied only on that and made no further effort; his suggestion to Abu Bakr that he should no longer give an extra share from the public treasury to those who had recently embraced Islam; and his decision not to share out the conquered land among the army.

THE TIME OF UTHMAN IBN 'AFFAN

When allegiance was given to 'Uthman, it was done on the condition that he work in accordance with the Book of Allah, the Sunnah of His Prophet, and the precedent set by the first two *Khulafa'*. This, he promised to do. 'Ali, however, indicated that when he became *Khalifah* he would be prepared to work according to the Book of Allah and the Sunnah of His Prophet, and then to do the best that his own knowledge and energy would allow. Because 'Uthman showed that he was willing to undertake to work in accordance with the precedents set by the first two *Khulafa'* he was supported by Abd al Rahman, who had the casting vote. Thus, a third source of legislation, the precedent set by the first two *Khulafa'*; was added at the time of the third *Khalifah*, and was approved by him.

Since 'Ali had reservations about this, when he himself became the *Khalifah* he acted according to his own Ijtihad in matters for which the earlier *Khulafa'* had already produced Ijtihad. For example, 'Ali reconsidered the issue of whether slave women who had begotten children for their masters could be sold.

'Uthman ibn Affan was one of the *Sahabah* who did not produce a great number of *Fatawa*, probably because most of the matters he came across had already been dealt with by Abu Bakr and 'Umar, and he preferred to adopt their opinions. But in some cases, he had to make Ijtihad, just as his predecessors had done. Once, before 'Uthman had become *Khalifah*, 'Umar asked him about a legal matter. In reply, 'Uthman said: "If you follow your own opinion, that will be right. But, if you follow the opinion of the *Khalifah* before you (i.e. Abu Bakr), that is better, because he was so good at passing judgment!"

He also performed his own Ijtihad when, during the *Hajj*, he did not shorten *Salah* in Mina; though certainly it is permitted to do so. There are two possible explanations for this: the first is that he had been married at Makkah, and thought that the people of Makkah were not permitted to shorten their *Salah* in Mina; the second explanation is that he was afraid that some bedouins might be confused when they watched him do so, and so he did not.

'Uthman also formulated the Ijtihad that all people should read the Qur'an according to Zayd's way of recitation, because he thought that this was the most sound, and the most likely to forestall the occurrence of disagreements.

THE TIME OF 'ALI IBN ABU TALIB

'Ali was like 'Umar ibn al Khattab in the way he understood and applied the texts of the Qur'an and in his deep concern with linking particular issues to general principles. Prior to his assuming the office of *Khalifah*, he was considered the best judge in Madinah.

When the Prophet (PBUH) appointed 'Ali judge in Yemen, he (PBUH) prayed for him, saying: "0 Lord! Guide his heart and make him speak the truth." Indeed, 'Ali proved to be an excellent judge, and resolved many difficult cases.

'Ali described his own knowledge by saying: "By Allah, no verse of the Qur'an was ever revealed except that I knew concerning what it was revealed, and where and why it was revealed. My Lord has bestowed upon me a heart that is understanding and a tongue that is articulate."

Whenever a matter was referred to Ali for judgment, he would accept it without hesitation. And if he was asked to give a *Fatwa*, he would do so by citing from the Book of Allah, and then the Sunnah of the Prophet (PBUH). Indeed, the extent of his knowledge of the Qur'an and Sunnah was very well known.

'A'ishah said: "In regard to the Sunnah of the Prophet (PBUH), he was the most knowledgeable of all people."

'Ali used to formulate his own opinion by means of Ijithad based on *al Qiyas, al Istishab*[27], *al Istihsan*[28] and *al Istislah*[29], always basing his opinion on the broader aims of the Shari'ah. when consulted concerning a possible increase in the *Hadd*-punishment for one found guilty of drinking alcohol, he compared drunkenness to the false basis that drunkenness could lead a person to make such an accusation.

During his *Khilafah*, 'Umar consulted 'Ali concerning the punishment of a group of people who jointly conspired to commit premeditated murder. 'Ali said, "0 Commander of the Faithful! If a group of people joined together in stealing, would you not cut one hand off of each of them?" when 'Umar replied in the affirmative, 'Ali said, "Then the same applies in this case." Consequently, 'Umar uttered his famous saying: "If all the citizens of San'a were to join together in murdering one man, I would execute the lot of them."

The analogy between murder and robbery was made because in each case there is a criminal motive shared between all who commit these acts, and it is this which requires rebuke and deterrent punishment.

Moreover, 'Ali preferred to burn alive those overzealous apostates and heretics who defied him, although he was well aware that the Sunnah ruling was merely to put such disbelievers and apostates to death. In this ruling, 'Ali showed himself keen to establish the strictest possible deterrent from the worst kinds of apostasy, because he considered this to be a very serious matter. Thus, he established the harshest punishment for such an act, so as to deter people from committing it. Moreover, to emphasize this, he recited the following verses of poetry extemporaneously:

"when I realized how grievous the matter was, I lit my bonfire and called for Qanbar."

Once 'Umar heard of a woman whose husband was away on a military expedition, and who was receiving strangers in her home. He therefore decided to send a messenger to her that she should not receive strangers while her husband was absent. when the woman heard that the *Khalifah* wanted to speak to her, she became fearful and, as she was pregnant, she miscarried the child on her way to see 'Umar.

'Umar, greatly disturbed by what had occurred, consulted the *Sahabah* about the matter. Some of them, including 'Uthman ibn 'Affan and 'Abd al Rahman ibn 'Awf, assured him: "You were merely attempting to educate her; you have done nothing wrong."

Then 'Umar turned to 'Ali, asking his opinion. 'Ali replied, "These men have spoken, and if this is the best opinion they can come up with, then fair enough. But, if they have spoken only to please you, then they have cheated you. I hope that Allah will forgive you for this sin, for He knows that your intention was good. But, by Allah, you should pay compensation for the child."

'Umar said, "By Allah, you have spoken sincerely to me. I swear that you should not sit down until you have distributed this money among your people."

THE FUQAHA' AMONG THE SAHABAH AND THE TABI'UN

This period is considered to have begun with the passing of the period that preceded it, in 40 AH, when the period of the "Rightly Guided" Caliphs ended. Thus began a new era, that of the *Fuqaha'* from among the *Sahabah* and the elder *Tabi'un*. Legislation at this stage was still very much as it had been during the previous stage, as the sources of that legislation, ie. the Qur'an, the Sunnah, *al Ijma'* and *al Qiyas*, remained the same. Nonetheless, legislation at this stage differed in many aspects from what had gone before.

Among the more significant changes were the following:

1. Scholars had become more interested in delving into what lay beyond the explicit meanings of the texts.
2. Their ways of dealing with the Sunnah underwent a great deal of change. Essentially, this difference was the outcome of political differences that accompanied the emergence of various sectarian and philosophical factions, such as the *Shi'ah* and *Khawarij*, whose attitude to the Sunnah was different. The *Shi'ah* refused to accept Hadith which were not narrated by their own followers; and the *Khawarij* refused to accept Hadith if, anywhere in the chain of the Hadith's narrators there was no more than a single narrator[30]. The *Khawarij* also rejected all Hadith not supported by a text from the Qur'an.
3. Owing to the divisions which had arisen, *al Ijma'* was no longer a possibility in this period. Basically, this was because every group mistrusted the scholars of every other group, and would no longer accept any of their opinions, whether they agreed or disagreed with them. In addition, the

Fuqaha' from among the *Sahabah* had become scattered all over the Islamic world, so that it was no longer possible for them to meet in order to discuss matters.

4. Also in this period, the narration of Hadith and Sunnah became popular, whereas this had not previously been the case.

5. The fabrication of Hadith, for many well-known reasons which we do not need to discuss here, became widespread. In this respect, Muslim reported that Ibn Abbas said: "We used to narrate many Hadith from the Prophet (PBUH) without ever having to worry about fabrication. But when people started to be careless in narrating things attributed to the Prophet, we stopped narrating Hadith."

CHAPTER THREE

LEGISLATION AFTER THE TIME OF THE SAHABAH

The time of the *Sahabah* came to an end between 90-l00 AH, and was followed by the time of the *Tabi'un* whose scholars became responsible for *Fiqh* and giving *Fatawa*. The last of the *Sahabah* in Kufah died in 86 or 87 AH. The last one in Madinah, Sahl ibn Sa'd al Sa'idi, died in 91 AH. The last one in Basrah, Anas ibn Malik, died in 91 AH (some say 93 AH). The last one in Damascus, 'Abd Allah ibn Yusr, died in 88 AH. The last one of the *Sahabah*, 'Amir ibn Wathilah ibn 'Abd Allah (Abu Tufayl), died in 100 AH.

Thereafter, those who became responsible for issuing *Fatawa* were the freed men *Mawali*, most of whom had lived with the *Fuqaha'* among the *Sahabah*, such as: Nafi', the freed man of Ibn 'Umar; 'Ikramah, the freed man of Ibn 'Abbas; 'Ata' ibn Rabah, the Faqih of Makkah; Tawus, the Faqih of the people of Yemen; Yahya ibn Kathir, the Faqih of Yamamah; Ibrahim al Nakha'i, the Faqih of Kufah; Hasan al Basri, the Faqih of Basrah; Ibn Sirin, also of Basrah; 'Ata' al Khurasani in Khurasan, and others. Indeed, Madinah was unique in having a *Faqih* from Quraysh, Sa'id ibn al Musayyab.

These *Tabi'un* very rarely altered the *Fatawa* of the *Sahabah* from whom they had gained their knowledge; hence it is difficult to find differences between their methods of deriving judgements and those of their predecessors. Even so, the methods of deriving judgements were, at this stage, starting to evolve and, in the process, to become clearer than ever before.

It is narrated that Hasan ibn 'Ubayd Allah al Nakha'i said: "I asked Ibrahim al Nakha'i: 'Did you hear from others all the *Fatawa* which I hear you giving?' He said, 'No.' I asked him: 'Then you give *Fatawa* that you did not hear?' He said: 'I heard what I heard; but when I was confronted with matters concerning which I had not heard anything, I compared them, by analogy, with matters which I had heard about.'"[31]

Among the significant features of this period was the emergence of differences of opinion between legal scholars on a variety of matters. This was underscored by two decisions taken by the *Khalifah* of the times, 'Umar ibn 'Abd al 'Aziz.

1. He ordered that practices attributed to the Prophet (PBUH) should be collected and written down. Accordingly, the people of every locality wrote down in books whatever they knew to be a part of the Sunnah[32].
2. He restricted the authority to issue *Fatawa*, in most districts, to a few named individuals, as he did in Egypt, when he named only three people for this purpose. Interestingly, two of them were freedmen, Yazid ibn Abu Habib and Abd Allah ibn Abu J'afar, and the third was an Arab, Ja'far ibn Rabi'ah. When the *Khalifah* was questioned about appointing two freedmen and only one Arab, he answered : "What fault is it of mine if the freedmen are improving themselves and you are not?"[33]

In his letter to Abu Bakr Muhammad ibn 'Amr ibn Hazm al Ansari, the *Khalifah* explained his reasons for ordering that the practices attributed to the Prophet (PBUH) should be written down. He wrote: "Look for whatever Hadith of the Prophet (PBUH), or Sunnah, or practice you can find. Then write these down for me; for I fear that this knowledge will pass away with the passing of the scholars."[34]

AFTER THE TABI'UN: THE TIME OF THE MUJTAHID IMAMS

This period was described by Wali Allah al Dahlawi as follows:

"The *Fuqaha'* of the period took the Hadith of the Prophet (PBUH), the decisions of the early judges, and the legal scholarship of the *Sahabah*, the *Tabi'un* and the third generation, and then produced their own Ijtihad."

This was the way the legal scholars of those times worked. Basically, all of them accepted both the *Musnad*[35] as well as the *Mursal*[36] Hadith."

Moreover, it became their practice to cite the opinions of the *Sahabah* and *Tabi'un* as evidence. Essentially, there were two reasons for this:

1. Such opinions were actually Hadith of the Prophet (PBUH) which had been narrated by one of the *Sahabah* or the *Tabi'un* who had, for fear of misquoting, not dared to attribute the Hadith to the Prophet (PBUH).
2. The other likelihood is that such opinions were derived by the *Sahabah* from the texts of Hadith, and represented their own understanding of the Sunnah.

In this respect, of course, the *Sahabah* were better than those who came later, because they had known the Prophet (PBUH), and were thus more capable of interpreting what he had said. Therefore, their judgements and opinions were accepted as authoritative, except in cases where they themselves differed, or where their pronouncements were in clear contradiction to sound Hadith of the Prophet (PBUH).

On the other hand, in cases where two or more Hadith conflicted, the scholars would refer to the opinions of the *Sahabah* in order to determine which of the two Hadith was the correct one. Thus, if the *Sahabah* said that a Hadith had been abrogated, or was not to be understood literally; or if they did not expressly say anything about a Hadith, but had ignored it, and had not acted in conformity with it, thus indicating that the Hadith was in some way defective, or that it had been abrogated, or that its interpretation was other than the literal, then the *Mujtahid* Imams would accept their opinions.

When the pronouncements of the *Sahabah* and *Tabi'un* differed on any matter, then each *Faqih* would follow the rulings of those from the same region as himself, and his own teachers, because he would be more able to discern the authenticity, owing to his familiarity with the narrators, of the opinions and sayings that reached him on their authority. Likewise, the *Faqih* would be better acquainted with their legal methodology.

The legal school of thought based on the opinions of 'Umar, 'Uthman, Ibn 'Umar, 'A'ishah, Ibn Abbas and Zayd ibn Thabit, and their companions from among the Tabi'un, like Sa'id ibn al Musayyab (d 93 AH), 'Urwah ibn Zubayr (d 94), Salim (d 106), Ata' ibn Yasar (d 103), Qasim ibn Muhammad (d 103), 'Ubayd Allah ibn 'Abd Allah (d 99), al Zuhri (d 124), Yahya ibn Sa'd (d 143), Zayd ibn Aslam (d 136) and Rabi'at al Ra'i (d 136), was the school most acceptable to the people of Madinah. It was for this reason that Imam Malik based his legal arguments on their teachings.

In the same way, the legal opinions of 'Abd Allah ibn Mas'ud and his companions, the judgements of the *Khalifah* 'Ali, Shurayh (d 77), and al Sha'bi (d 104), and the *Fatawa* of Ibrahim al Nakha'i (d 96) were the most acceptable to the people of Kufah.

Commenting on this phenomenon, Wall Allah al Dahlawi wrote:

When Masruq (d 63 AH) followed Zayd ibn Thabit's opinion concerning sharing out the inheritance between the grandfather and the brothers [of the deceased], 'Alqamah (d 62) asked him, "Is any of you more knowledgeable than Abd Allah (ibn Mas'ud)?"

Masruq answered, "No, but Zayd ibn Thabit and the people of Madinah share the inheritance between the grandfather and the brothers..."

Thus, if the people of Madinah agreed on a matter, the scholars of the generation following the *Tabi'un* adopted it resolutely. This is what Malik meant when he said: 'The Sunnah concerning which we, the people of Madinah, have not differed is such-and-such.'

If the early scholars at Madinah had differed concerning any matter, the later scholars would follow those opinions which were stronger and more dependable either by virtue of their having been adopted by a majority of the early scholars, or of their having been the result of sound legal analogy, *al Qiyas*, or which were derived from some text in the Qur'an or the Sunnah. It is to this process that Malik refers when he says: 'This is the best that I have heard.' Then, if the later scholars could find no solution to a problem in the work of their predecessors, they would themselves turn to the relevant texts in order to formulate their own legal opinions.

At this stage, the scholars were inspired to start recording things in writing. So Malik (d 179) in Madinah, Ibn Abu Dhi'b (d 158), Ibn Jurayj (d 150?) and Ibn 'Uyaynah (d 196) in Makkah, al Thawri (d 161) in Kufah, and Rabi' ibn Subayh (d 160) in Basrah, began to write things down, and they all followed the same method.

When the *Khalifah*, Mansur, performed *Hajj* and met al Imam Malik, he said: 'I have decided to order that copies be made of these books which you have written. I will send a copy to every region of the Muslim world and order the scholars to act in accordance with them and not refer to any other works.'

Malik said '0 Amir al Mu'minin, do not do that! Already the people have heard different legal opinions, and listened to Hadith and narrations; and they have accepted whatever reached them first, so that this has contributed to differences in the prevailing practices among people. Leave the people of each town with the choice they have already made.'

The same story is told with reference to the *Khalifah*, Harun al Rashid, that he wanted to obligate the people to follow the *Muwatta*.'

But Malik said to him: 'Do not do that, for the *Sahabah* of the Prophet used to differ on the Sunnah. Then they scattered and settled throughout the Muslim world; and now their different ways are firmly established.'

... Malik was the most knowledgeable about the Hadith related by the people of Madinah from the Prophet (PBUH), and Malik's chains of narrators were the most reliable. He was also the most knowledgeable about the judgements of 'Umar and the legal pronouncements of 'Abd Allah ibn 'Umar and 'A'ishah and their companions from among the seven *Fuqaha'*. The sciences of Hadith narration and *Fatawa* were based on the knowledge of Malik and those like him.

Abu Hanifah was the most devoted to the legal interpretations of Ibrahim al Nakha'i and his colleagues, and would very rarely transgress their arguments. He was excellent at producing decisions based on Ibrahim's method, exact in employing that methodology in order to deal with details of case law.

If you wish to know the truth about what we have stated, then summarize the teachings of Ibrahim and his cohorts as recorded in the following works: *Al Athar* "Traditions" by Muhammad al Shaybani, the *Jami'* "The Compendium" of Abd al Razzaq and the *Musannaf* "Compilation' of Ibn Abu Shaybah, and compare them with Abu Hanifah's formal opinions. Indeed, you will find that Abu Hanifah departs only rarely from their way, and even then his opinion will not differ from the opinions of the jurists of Kufah."37

In fact, al Dahlawi's comments need to be considered. He was very eager to stress that al Imam Malik and Abu Hanifah, and their companions, were more or less conforming to the opinions of the *Tabi'un* and the *Sahabah* before them (as opposed to generating their own Ijtihad), and had not transcended the jurisprudence of their predecessors. This, however, is a conclusion with which it is difficult to agree.

It is well known that there are various approaches to Fiqh; and each of the Imams adopted a different approach to the subject. It is not a simple matter to claim that these were drawn from the *Sahabah* and the *Tabi'un*. Consider, for example, Malik's taking the customs and practices of the people of Madinah as a (secondary) source for legislation; or Abu Hanifah's use of al *Istihsan* and *al 'Urf*.38

Moreover, neither of them based their arguments on the Fatawa of the *Tabi'un*, but rather competed with them, saying: "They were men [of knowledge] and so are we."

In addition, unlike anyone before them, each had laid down his own set of conditions for accepting Hadith as authentic.

Moreover, the incidence of an increased circulation of Hadith in those times, in addition to the appearance of Hadith that had never been circulated at all, led, in some cases, to legal rulings and positions quite different from those held by the *Sahabah*.

RATIONALISTS AND TRADITIONISTS: *AHL AL HADITH AND AHL AL RA'I*

Perhaps this truth may become all the more intelligible when we mention the emergence of two informal schools of legal thought, the rationalists or *Ahl al Ra'i*, and the traditionists or *Ahl al Hadith*, and the appearance of differences between them concerning both source methodology, and issues of case law. While it is true that both of these schools had their roots in the approaches of the preceding two generations, it was at this time that their differences in matters of Fiqh become clear; and it was at this time that people began grouping themselves on the basis of their differences in deriving legal points from the sources.

Writers on Islamic legal history emphasize that the rationalist school of *Ahl al Ra'i* was an extension of the school of 'Umar and Abd Allah ibn Mas'ud who, among the *Sahabah*, were the most wide-ranging in their use of *Ra'y* (lit. opinion). In turn, 'Alqamah al Nakha'i (d. 60 or 70 AH), the uncle and teacher of Ibrahim al Nakha'i, was influenced by them. Ibrahim then taught Hammad ibn Abu Sulayman (d 120 AH) who, in turn, was the teacher of Abu Hanifah.

The same historians stress that the traditionist school of *Ahl al Hadith* was a continuation of the school of those Sahabah whose fear of contradicting the letter of the source texts *Nusus* made them circumspect to the point where they never went any further than the texts. This was the case, by and large, with 'Abd Allah ibn 'Umar ibn al Khattab, 'Abd Allah ibn 'Amr ibn al 'As, al Zubayr, and 'Abd Allah ibn 'Abbas.

The school of *Ahl al Hadith* became widespread in the Hijaz for many reasons, of which perhaps the most important were the great number of Hadith and other narrations known to the people of that area, and the fact that the region was more stable after the seat of the *Khilafah* had been moved, and most of the political activity had been transferred, first to Damascus, then to Baghdad. The Imam of Madinah, Sa'id ibn al Musayyab (d 94 AH), once noted that the people of Makkah and Madinah had not lost much of the Hadith and Fiqh, because they were familiar with the *Fatawa* and reports of Abu Bakr, 'Umar, 'Uthman, 'Ali (before he became *Khalifah*), 'A'ishah, Ibn Abbas, Ibn 'Umar, Zayd ibn Thabit and Abu Hurayrah, and thus did not need to use *Ra'i* in order to derive law.

The school of *Ahl al Ra'i*, on the other hand, gained currency in Iraq. The scholars of this group thought that legal interpretations of the Shari'ah should have a basis in reason, should take into account the best interests of the people, and should be backed by discernable wisdom. Indeed, these scholars felt it their duty to uncover these meanings and the wisdom behind the laws, and to make the connection between them; so that if the reasons for any law were to lose relevance with the passing of time and the changing of circumstances, the law would no longer be valid. If they found the reasons behind the law, they would sometimes prefer to cite arguments based on an analytical treatment of those reasons. Thus, in many cases, reason would be accorded legalistic preference when such reasoning conflicted with the evidence of certain categories of Hadith.

The spread of this method in Iraq was helped by the numbers of *Sahabah* influenced by the methods of 'Umar. Among them were Ibn Mas'ud, Abu Musa al Ash'ari, 'Imran ibn Husayn, Anas ibn Malik, Ibn Abbas and others. The spread was also assisted by the transfer of the *Khilafah* to Iraq, and the settling there of 'Ali and his supporters.

When the sects, like the *Shi'ah* and *Khawarij*, appeared in Iraq, conflict arose and the fabrication of Hadith became widespread[39]. Consequently, the legal scholars of Iraq were forced to lay down conditions for the acceptance of Hadith, according to which only a few of the reports given by the *Sahabah* living in Iraq were acceptable. Moreover, the great number of legal problems and the constant increase in unprecedented legal issues in that area were more than could be dealt with on the basis of reliable Hadith.

So, it was in this way that the Ummah, those who had not become involved with either the *Shi'ah* or the *Khawarij*, was divided into two groups, *Ahl al Hadith* and *Ahl al Ra'i*; and the conflict between them intensified.

Thus, *Ahl al Ra'i* often used to criticize *Ahl al Hadith* for having little intelligence and less Fiqh-understanding; while *Ahl al Hadith* claimed that the opinions of *Ahl al Ra'i* were based on no more than conjecture, and that they had distanced themselves from the necessary circumspection in those matters of religious significance which could only be ascertained through recourse to the source-texts.

In fact, *Ahl al Ra'i* agreed with all Muslims that once a person has clearly understood the Sunnah, he may not reject it in favour of what is no more than someone's opinion. Their excuse in all those cases in which they were criticized for contradicting the Sunnah is simply that they did not know any Hadith concerning the matter in dispute, or that they did know a Hadith but did not consider it sound enough owing to some weakness in the narrators or some other fault they found in it (a fault which perhaps others did not consider to be damaging), or that they knew of another Hadith which they considered sound and which contradicted the legal purport of the Hadith accepted by others.

Moreover, *Ahl al Hadith* agreed with *Ahl al Ra'i* on the necessity of having recourse to reason whenever a matter occurs for which there is no specific ruling in the source texts. Still, in spite of these areas of agreement, the conflict and tension between the two groups remained acute.

CHAPTER FOUR

AL IMAM AL SHAFI'I

Al Imam al Shafi'i was horn in 150 AH, the year in which al Imam Abu Hanifah died. He studied Fiqh, first in Makkah with some scholars of *Ahl al Hadith*, such as Muslim ibn Khalid al Zinji (d 179) and Sufyan ibn 'Uyaynah (d 198). Then he went to the Imam of Madinah and leader of *Ahl al Hadith*, Malik ibn Anas, and studied with him, and committed to memory (so as later to relate it) his collection of Hadith and legal opinions, the *Muwatta*. Indeed, al Imam al Shafi'i ever felt himself indebted to al Imam Malik.

It is reported that Yunus ibn 'Abd al A'la heard al Imam al Shafi'i say: "whenever the 'Ulama' are mentioned [and their work and knowledge compared], Malik outshines them all. No one has ever done me a greater favour than Malik ibn Anas."40 This is what al Imam al Shafi'i said after he had studied language, poetry, literature, some of the natural and mathematical sciences, and history.

Al Imam al Shafi'i was not impressed with all that he learned of the work of *Ahl al Hadith*. For example, he criticized them for their accepting a Hadith which *Munqati'*41, saying: "The *Munqati'* is nothing."

Al Imam al Shafi'i also criticized them for accepting the *Mursal*42 variety of Hadith, (though he himself made an exception in the case of Mursal Hadith related by Sa'id ibn al Musayyab,) and for imposing overly strict conditions for the acceptance of narrators as reliable (and the Hadith they related as authentic).

When al Imam al Shafi'i went to Iraq, the stronghold of *Ahl al Ra'i*, he noticed that they were ever eager to find fault with the legal methods and opinions of the people of Madinah, and especially of his teacher, al Imam Malik. Thus, al Imam al Shafi'i stood up in defense of his teacher, his school of thought and his methods. It is narrated that he once said:

Muhammad ibn al Hasan said to me: "Our teacher (i.e. Abu Hanifah) was more knowledgeable than yours. Your teacher should not have spoken, but our teacher would have been wrong to remain silent." I became angry and said to him: "I ask you by Allah, who had more knowledge of the Sunnah of the Prophet, Malik or Abu Hanifah?" He said, "Malik. But our teacher was more adept at *Qiyas*." I replied, "Yes, and Malik was more knowledgeable than Abu Hanifah about the Qur'an, about its abrogation, and about the Sunnah of the Prophet. Whoever has more knowledge of the Qur'an and Sunnah has more right to speak!"43

Al Imam al Shafi'i studied the books of Muhammad ibn al Hasan and other Iraqi scholars44. Indeed, he became Muhammad ibn al Hasan's pupil, and discussed his opinions, all the while supporting the Sunnah and *Ahl al Hadith*.

Al Imam al Shafi'i left Baghdad for a period of time, and when he returned, in 195 AH, there were forty or fifty study-circles that met regularly in the great mosque. Al Imam al Shafi'i began moving from one circle to another, explaining what "Allah and the Prophet said", while other teachers spoke only of what their teachers said. Eventually, there were no study groups in the mosque other than al Imam al Shafi'i's study group.

Some of the great scholars of the *Ahl al Ra'i*, like Abu Thawr, al Za'farani, al Karabisi and others, attended the study circles of al Imam al Shafi'i. Many abandoned the way of *Ahl al Ra'i* and began to follow al Imam al Shafi'i. Al Imam Ahmad ibn Hanbal also attended this circle, and it is narrated that he said: "Any narrator of Hadith who ever carried an inkpot benefited in some way from al Imam al Shafi'i". when al Imam Ahmad was asked to explain, he said: "The *Ahl al Ra'i* used to laugh at *Ahl al Hadith* until al Imam al Shafi'i taught them otherwise, and vindicated the traditionist position through sound arguments."45

Moreover, it was in response to a request from *Ahl al Hadith*, that al Imam al Shafi'i wrote his book, *Al Hujjah* (The Argument), in Baghdad, in order to refute the arguments which *Ahl al Ra'i* brought against him.46

Thereafter, al Imam al Shafi'i travelled to Egypt where he found that most of the people adhered strictly and unquestioningly to the opinions of Malik. Consequently, al Imam al Shafi'i began a critical analysis of Malik's legal opinions, and found that in some cases, "...he (Malik) formulates opinions on the basis of a general

principle, while ignoring the specific issue; whereas at other times he gives a ruling on a specific issue and ignores the general principle."

Al Imam al Shafi'i also found that Malik sometimes rejected a sound Hadith in favour of a statement made by one of the *Sahabah* or the *Tabi'un*, or in preference to his own reasoning. Sometimes, al Imam al Shafi'i discovered, Malik rejected the statement of one of the *Sahabah* in favour of the opinion of a *Tabi'i*, or his own personal opinion; and that he would do this in individual cases, and in extrapolating legal details, without taking general principles into account. Moreover, Malik claimed in many cases that there was *Ijma'* concerning the matter, when there was, in fact, disagreement about it.

Al Imam al Shafi'i also found that Malik's opinion that the *Ijma'* of the people of Madinah could be treated as source-evidence was, in fact, not very strong. He wrote a book entitled *Al Ikhtilaf Ma'a Malik* "Disagreement with Malik; in which he dealt with all of the matters mentioned above.47

According to al Imam al Shafi'i, al Imam Malik exceeded proper bounds in applying his principle of *al Masalih al Mursalah* (the Interest of the Greater Good) without having recourse to the abundance of source-evidence available. His opinion in regard to Abu Hanifah was that, in many cases, he concentrated on the particular, on minor issues and details, without regard for basic rules and principles.48

With these matters in mind, then, al Imam al Shafi'i came to the conclusion that the undertaking most deserving of attention was the collection of the principles of jurisprudence, the organization of the basic rules for their application, and the development of a source methodology by means of which questions of *Fiqh* may be decided through proper recourse to valid and relevant forms of evidence. Thus, *Fiqh* might become the practical application of this methodology, so that a new *Fiqh* might emerge as an alternative to the two established schools of legal thought.

It was for this reason that al Imam al Shafi'i wrote the *Risalah*, and built his *Fiqh* and legal teachings on the foundations of the principles and methodology he expounded in his book.

Al Imam Ahmad ibn Hanbal said: "Until al Imam al Shafi'i came along, we never thought of things like the general and the specific *al 'Umum wa al Khusus*".49

Al Imam al Shafi'i used to say to Imam Ahmad: "You have more knowledge about Hadith and narrators than I. So, if a Hadith is authentic, then tell me. If it is authentic, I will accept it, even if it is (reported by narrators) from Kufah, Basrah or Damascus.50 This statement clearly indicates that al Imam al Shafi'i was more concerned with establishing principles than with dealing with minor issues and details.

The scholars writing on the subject of the history of *Usul al Fiqh* are unanimously agreed that the first writer on the subject was al Imam al Shafi'i, and that the first book ever written on the subject was the *Risalah*51.

In his book, *al Bahr al Muhit*, al Zarkashi (d 794 AH) devoted a chapter to this, in which he said:

"Al Imam al Shafi'i was the first to write about *Usul al Fiqh*. He wrote the *Risalah*, *Ahkam al Qur'an* (Legal Interpretations of the Qur'an), *Ikhtilaf al Hadith* (Conflicting Hadith), *Ibtal al Istihsan* (The Invalidity of Juristic Preference), *Jima' al 'Ilm* (The Congruence of Knowledge), and *al Qiyas* (Analogical Reasoning)-the book in which he discussed the error of the Mu'tazilah group, and changed his mind about accepting their testimony. Then, other scholars followed him in writing books on *al Usul*."
In his commentary on the *Risalah, Al Juwayni* wrote:
"No one before al Imam al Shafi'i wrote books on the subject of *al Usul*, or had as much knowledge as he concerning it. It is related that Ibn 'Abbas mentioned something about the particularization of the general, and that some of the others among the early scholars made pronouncements which suggested they understood these principles. Still, those who came after them said nothing about *al Usul*, and they contributed nothing to it. We have seen the books of the Tabi'un and the third generation, and have found that none of them wrote books about *al Usul*."52

THE METHOD OF AL IMAM AL SHAFI'I IN HIS BOOK, *AL RISALAH*

Al Imam al Shafi'i began his book by describing the state of mankind just before the mission of the Prophet. In doing so, he divided them into two groups:

1. *Ahl al Kitab* "the People of the Book"; or, the followers of earlier revelation who had altered their scripture and tampered with some of its legal injunctions. Essentially, these people had lapsed into disbelief and then attempted to fuse their falsehood with the Truth which Allah had revealed.
2. The *Mushrikun and Kafirun* who worshipped idols instead of Allah.

Then al Imam al Shafi'i went on to say that Allah rescued all mankind by sending the Last of the Prophets, and revealing to him His Book, so that they might be delivered by means of it from the blindness of disbelief into the light of guidance:

Behold, it is a Divine Scripture, sublime. No falsehood can attain to it openly and neither in a stealthy manner; (since it is] bestowed from on high by One who is Truly Wise, Ever to be Praised (41 : 41-42).

Then al Imam al Shafi'i went on to discuss in detail the status of the Qur'an in Islam and its comprehensive statements about what Allah had permitted and prohibited, how man is to worship Allah, the rewards of those who obey Him, the punishments of those who disobey Him, and how He admonished them by telling the stories of those who had gone before.

Then, al Imam al Shafi'i explained that students seeking knowledge of Islam should learn as much of the Qur'an and its sciences as possible; and that when their intentions are pure they may both quote its verses and infer meanings from them.

At the end of his Introduction to the *Risalah*, al Imam al Shafi'i said: "No problem will ever beset any of the followers of Allah's religion except that there be guidance in the Book of Allah to indicate the right way. For, Allah, the Blessed and Most High, said:

A Book We send to you, that you may bring forth mankind from darkness to light, by the permission of their Lord to the path of the Almighty, the Praiseworthy (14:1).
He also said:
And We sent down to you the Reminder, that you may make clear to mankind what was sent down to them; and so haply they may reflect (16:46).
Also:
And We have sent down to you the Book as an explanation of everything; and as a guidance, and a mercy, and good tidings to the Muslims (16:91).
And:
Likewise, We have revealed to you a spirit of our bidding. You did not know what the Book was, nor the faith; but We made it a light by which We guide whomsoever We will of Our servants. And, verily, you shall be a guide unto a right path, the path of Allah (42:52).

There follows a chapter on *al Bayan*53 in which the word is defined as a legal term, and then divided into categories in explanation of the ways that the Qur'anic declaration indicates matters of legal significance. There are five such categories:

1. That which Allah expressed as a specific legal provision which admits of no interpretation other than its literal meaning. This category of *al Bayan* needs no other explanation than the Qur'an itself.
2. That which the Qur'an mentions in texts that may be interpreted in several ways; and for which the Sunnah provided an explanation as to exactly which one was intended.
3. That which was clearly stated to be obligatory; and which the Prophet, upon him be peace, explained in terms of how, why, upon whom, and when applicable and when not.
4. That which was explained by the Prophet, upon him be peace, but not mentioned in the Qur'an. Allah (SWT) commanded in the Qur'an that the Prophet be obeyed and his rulings accepted. Therefore, what is said on the authority of the Prophet, is said on the authority of Allah.
5. That which Allah requires His creation to seek through Ijtihad. This is *Qiyas*. According to al Imam al Shafi'i, *Qiyas* is a method for reaching a legal decision on the basis of evidence (a precedent) in which a common reason, or an effective cause, is applicable.

Al Imam al Shafi'i then went on to explain these five categories in five separate chapters, giving examples and evidence for each. Thereafter, the *Risalah* included the following chapters:

- The General Declaration revealed in the Qur'an is meant to be Comprehensive *'Amm*, but includes the Particular *Khass*.
- The Explicit General Declaration of the Qur'an in which the General and the Particular are included.
- Explicit General Declaration of the Qur'an which appears to be General but is intended to be entirely Particular.
- The Category of *al Bayan* in the Qur'an by means of which meaning is clarified by context.
- The Category of *al Bayan* in the Qur'an the wording of which indicates the Implicit *al Batin* meaning rather than the Explicit *al Zahir*.
- That, of the Qur'an, which was revealed as General but which the Sunnah specifically indicates is meant to be Particular.

In the above-mentioned chapter; al Imam al Shafi'i explained the validity of the Sunnah as evidence and its status in the religion. For this reason, he then included the following chapters:

- The duty imposed by Allah in the Qur'an to follow the Sunnan of His Prophet.
- Allah's command ordering obedience to the Prophet is both associated with obedience to Him and ordered independently.
- Matters in which Allah commanded obedience to the Prophet.
- How Allah made it clear that the Prophet was obliged to follow what was revealed to him and to obey whatever commands Allah gave him; and that Allah will guide any who follow him.

In this chapter, al Imam al Shafi'i affirmed that parts of the Sunnah of the Prophet dealt with and were related to the Qur'an, whilst other parts explained matters concerning which there was no relevant text in the Book. Al Imam al Shafi'i also showed that the Sunnah existed independently of the Qur'an, and quoted evidence in refutation of those who disagreed with him in that matter. Then he said: "I shall explain what I have already said about the Sunnah, (whether) it particularizes the Qur'an or provides additional legislation for matters not mentioned therein; and this will illustrate what I have discussed above, Allah willing. I shall first speak of the Sunnah based on the Book of Allah, by dealing, by means of deductive reasoning, with the subject of the Sunnah in regard to the abrogating *al Nasikh* and abrogated *al Mansukh* passages of the Qur'an. Thereafter, I shall mention the Fard-duties specified (in the Qur'an) and the Sunnah in regard to them; the Fard-duties revealed in General terms which the Prophet (PBUH) made Particular through his specifying details relating to how and when; the General texts that were intended to be understood as General, and the General texts that were intended to be understood as Particular; and, finally, the Sunnah of the Prophet (PBUH) for which there is no textual authority from the Book of Allah."

There follows a chapter entitled, "The Origin of the Abrogating and the Abrogated"; which explains that Allah (SWT) used abrogation to make (the Shari'ah) easier and more flexible. This chapter also makes the point that a verse *Ayah* of the Qur'an can only be abrogated by another verse of the Qur'an; and that the Sunnah can only be abrogated by the Sunnah.

Then he dealt with the abrogating and the abrogated which are indicated in part by the Qur'an, and in part by the Sunnah.

Thereafter comes mention of the Fard-duty of *Salah* and the explanation in the Qur'an and the Sunnah concerning those who may be excused from performing it, and those whose *Salah* is not accepted because of some act of disobedience they may have committed.

Then al Imam al Shafi'i writes of the Abrogating and the Abrogated that are indicated by the Sunnah and *al Ijma'*;

- of the *Fard*-duties which Allah laid down in the text of the Qur'an,
- of the *Fard*-duties laid down in the text of the Qur'an which the Prophet (PBUH) also dealt with in the Sunnah.

- of the *Fard*-duties laid down in the text of the Qur'an which the Sunnah indicated were meant to be Particular in application,
- of the *Fard*-duties in general which are clearly meant to be compulsory and for which the Prophet (PBUH) gave the explanation as to how they were to be performed; like *Salah, Hajj, Zakah*, the number of wives, women whom one is not permitted to marry, and dietary prohibitions.

In the next chapter he discussed defects in Hadith, and explained that the contradictions between Hadith could be attributed to many reasons. He then went on to explain some of these reasons. For example, a contradiction might appear because one Hadith was abrogated by another, or because mistakes occurred in the narration of the Hadith. He explained the mistakes which might cause contradictions in the Hadith, and many other reasons for such contradictions. Then he dealt with the various types of prohibitions, and explained that some Hadith clarify others.

Al Imam al Shafi'i also included a chapter on knowledge, and explained that there are two types of knowledge. The first is that sort of common knowledge which no sane, mature adult could possibly not know about. All of this knowledge can be found mentioned in the text of the Qur'an, and every Muslim knows all about it because it has been transmitted down from the Prophet (PBUH) to each succeeding generation in turn. There is no dispute concerning the authenticity of this knowledge, and all are agreed that it is binding. Indeed, the nature of this knowledge is such that there can be no mistakes in its transmission or interpretation.

The second type of knowledge is of the details which stem from the obligations, and the specific laws relating to them. These are not mentioned in the text of the Qur'an, and most of them are not mentioned in the text of the Sunnah, apart from single-individual narrations, *Ahad*.

Thus, al Imam al Shafi'i introduced a new subject, the single- individual narration, *Khabr al Wahid*. Al Imam al Shafi'i then explained what is meant by this term, and the conditions which determine whether or not a narration is of the single-individual variety. The difference between testimony and reporting, *Shahadah and Riwayah*, was explained; as were those matters which may be accepted through a single-individual narration, and those for which a *Khabr al Wahid* alone is not sufficient.

Then al Imam al Shafi'i discussed the authority of the *Khabr al Wahid*, and whether such reports could be adduced as evidence. His conclusion, supported by very sound arguments, was that indeed they could be used. Thus, al Imam al Shafi'i succeeded in refuting all the misgivings brought up by his opponents on this issue.

The following chapters then follow:

- On *al Ijma'*: its definition, and legal authority.
- On *al Qiyas*: its meaning and nature, the need for it, the varieties of *Qiyas*, and who is, and is not, competent to employ it.
- On Ijtihad: how it is based first on the Qur'an, and then on the Sunnah; what constitutes correct and incorrect Ijtihad.
- On *al Istihsan*, Juristic Preference: al Shafi'i was careful to explain that no Muslim is permitted to use *al Istihsan* in order to contravene the Hadith, nor may he pronounce any legal judgement which is not based on the Qur'an, Sunnah, *al Ijma'* or *al Qiyas*. He also explained the difference between *al Qiyas* and *al Istihsan*.
- On disagreement among the scholars: al Imam al Shafi'i explained that these disagreements are of two types; the type that are prohibited and the type that are not. The types of disagreements which are not allowed are those concerning matters for which Allah has provided clear evidence in the texts of the Qur'an or Sunnah. Those disagreements which are permitted pertain to matters which could be interpreted in several ways and to which each scholar applies his own reasoning. Al Imam al Shafi'i then gave examples of both kinds of disagreements, and mentioned the reasons for each. He also gave examples of issues on which the *Sahabah* had disagreed, such as *'Iddah*, oaths and inheritance. In this chapter; al Imam al Shafi'i mentioned something of his methodology for assigning preference to the opinions of the *Sahabah* when they differed.

The *Risalah* concludes with an explanation of al Shafi'i's opinion on the "categories of evidence" mentioned above:

"We base our judgements primarily on the Qur'an and the agreed-upon Sunnah concerning which there is no dispute, and say: 'This is our judgement after studying both the explicit and the implicit meanings of the texts.' Then, if we have to refer to the Sunnah that is narrated by only a few persons and concerning which there is no agreement, we say: 'We accept the Hadith as it is, but are aware that there could be some hidden fault in its narrators.' Then we will refer to at *Ijma'* then to *al Qiyas. Al Qiyas* is weaker than at *Ijma'* and it is used only when necessary because it is not lawful to use *al Qiyas* when there is a narration concerning the matter being dealt with."

From the writings of al Imam al Shafi'i, we know which sources of Islamic jurisprudence were agreed upon, and which were the cause of disagreement at that time.

The sources which were agreed upon were: The Qur'an and the Sunnah in general.

The sources concerning which there was disagreement included the Sunnah in its entirety, to some, and the *Khabr al Wahid* narrations (which al Imam al Shafi'i referred to as *al Khassah*) in particular. But al Imam al Shafi'i's contribution was that he examined these two issues in their entirety in the *Risalah* and in his *Jim' al 'Ilm*.

Other matters concerning which there were disagreements included:

1. *Al Ijma'*: There were disagreements concerning its validity as evidence; concerning the different types of *al Ijma'*; whose *Ijma'* may be accepted as evidence; matters m which *al Ijma'* may be considered as evidence; and how the public may be made aware that there is Ijma' on any particular matter.
2. *Al Qiyas* and *al Istihsan*: There were disputes concerning the meaning of these terms, their nature, validity as evidence, the possibility and method of using them, and whether the actions of the *Sahabah* could be considered *Qiyas or Istihsan*.
3. There was also open disagreement concerning the significance of the Qur'anic command and prohibition, their meanings and their impact on the rest of the legal, *Fiqh* judgements. We may notice that in this period, the four Sunni Imams did not use strictly defined terminology such as *al Tahrim* "Prohibition", *al Ijab* "obligation", etc., as these words were not commonly used in their vocabulary. Rather, this kind of legal terminology appeared later on, as Ibn Qayyim has stated.[54]
4. Other sources of Islamic jurisprudence concerning which there are differences were not commonly discussed at the time of the early jurists. For example, such terms as *al 'Urf, al 'Adah*, and *al Istishab* were not part of their vocabulary.

CHAPTER FIVE

USUL AL FIQH AFTER AL IMAM AL SHAFI'I

Al Imam al Shafi'i's *Risalah* dominated studies in Islamic jurisprudence from the moment it appeared. Indeed, as a result of it, the scholars divided into two groups. One group, the majority of *Ahl al Hadith*, accepted it, and used it in support of al Shafi'i's school of legal thought. The other group, however, rejected most of what it contained, and attempted to refute whatever of al Imam al Shafi'i's work contradicted their own methods and practice before it had the chance to influence people. The members of this group were taken almost exclusively from the *Ahl al Ra'i*, all of whom were in complete disagreement with nearly all that al Imam al Shafi'i had written.

Ibn al Nadim mentioned books which were written in the field of *Usul al Fiqh* after the *Risalah*, including *al Nasikh wa al Mansukh* and *al Sunnah* by al Imam Ahmad ibn Hanbal (d 233 AH). *Al Sunnah*, however, is more a book on *Tawhid* and basic Islamic beliefs "*Aqa'id*" than of jurisprudence. There are two versions of this work in print; the longer version is the one printed in Makkah in 1349 AH, of which there are manuscript copies in the Dar al Kutub and Zahiriyyah libraries in Egypt and Damascus respectively. A smaller version, printed in Cairo without a date, deals with the fundamental beliefs of the Sunni Orthodoxy, or "*Ahl al Sunnah*".

Al Imam Ahmad also wrote *Ta'at al Rasul* "Obedience to the Messenger". Ibn Qayyim quotes from it often in his book, *I'lam al Muwaqqi'in*, and it seems that he possessed a copy of it. Nonetheless, I have looked for this book in many places, but have always been unable to find it. From the quoted passages in Ibn Qayyim's book, it is apparent that the book was indeed an important one on the subject of jurisprudence, and the methodology of dealing with the Sunnah. It may have been lost after Ibn Qayyim's time, or bound into another book, or the title page lost so that it may only be found after much searching.

The sources also mention that Dawud al Zahiri (d 270 AH) wrote *al Ijma'* "Consensus", *Ibtal al Taqlid* "On the Abolition of Imitation", *Khabar al Wahid* "On the Single-Individual Narration", *al Khabar al Mujib* "On the Obligating Narration", *al Khusus wa al 'Umum* "On the Particular and the General", *al Mufassar wa al Mujmal* "The Succinct and the Detailed", *al Kafi fi Muqabalat al Muttalibi*, i.e. al Imam al Shafi'i, "0n the Encounter with al Shafi'i", *Mas'alatan Khalafa Fihima al Shafi'i* "Two Issues on which He Differed with al Imam al Shafi'i".

During this period, the *'Ulama'* who accepted the school of thought of al Imam Abu Hanifah devoted their attention to the study of Shafi'i's *Risalah*, both in order to refute what they disagreed with, and to derive their own source-methodology and principles of jurisprudence from the case law *Fatawa of al Imam Abu Hanifah*.

In this vein, the Hanafi scholars produced several works. 'Isa ibn Abban (d 220 Ah) wrote *Khabar al Wahid, Ithbat al Qiyas*, "Validating Analogical Deduction", and *Ijtihad al Ra'i*, "The Exercise of legal Reasoning".

Al Barza'i (d 317) wrote *Masa'il al Khilaf* "Issues of Disagreement", of which there is a 236-page copy in the Zaytunah Library in Tunis, number 1619.

Abu Ja'far al Tahawi (d 321) wrote *Ikhtilaf al Fuqaha'* "Disagreement of the Jurists", which was summarized by Abu Bakr al Jassas (d 37O). There is a copy of this hook in Cairo. For more details, refer to the Index of *Ma'had al Makhtutat* (1/329).55

Al Karabisi al Najafi (d 322) wrote *al Furuq* "Differences", of which there are manuscripts in the Ahmad III and Fayd Allah libraries in Istanbul.

Several untitled works on jurisprudence were also attributed to Ibn Sama'ah (d 233).56

Al Kannani (d 289) wrote *al Hujjah fi al Radd 'Ala al Shafi'i*, "The Evidence in Refutation of Imam Shafi'i".

'Ali ibn Musa al Qummi, the Hanafi (d 305) wrote *Ma Khalafa Fihi al Shafi'i al 'Iraqiyin Fi Ahkam al Qur'an* "Instances in which al Shafi'i Opposed the Iraqis in the Legal Interpretation of the Qur'an", *Ithbat al Qiyas, al Ijtihad* and *Khabar al Wahid*.

Abu al Hasan al Karkhi (d 340) wrote his well-known hook *al Usul* "The Sources", which was printed with a collection of other books in Cairo (no date).

Abu Sahl al Nawbakhti (d. circa 93 AH), who belonged to the *Imamiyah*, wrote *Naqd Risalat al Shafi'i* "A Critique of al Shafi'i's *Risalah*", *Ibtal al Qiyas* "Invalidating *al Qiyas*", and *al Radd 'Ala Ibn al Rawandi Fi Ba'd Ara'ihi al Usuliyah* ("Refutation of Certain of Ibn al Rawandi's Legal Opinions"). Ibn Junayd (d 347), who belonged to the Zaydiyyah group, wrote *al Faskh 'Ala Man Ajaza al Naskh lima Tamma Shar'uhu wa Jalla Naf'uhu* "The Nullification of those who Permitted Abrogation on Laws already Promulgated and Proved Beneficial", and *al Ifham li Usul al Ahkam* "Understanding Juristic Principles".

The adherents of al Imam al Shafi'i's school of legal thought produced the following works:-

Abu Thawr (d 240) wrote *Ikhtilaf al Fuqaha'* "Disagreement of the Jurists".

Abu 'Abd Allah Muhammad ibn Nasr al Marwazi (d 294) also wrote a book on the same subject.

Abu Abbas ibn Surayj (d 305) wrote a hook refuting both 'Isa ibn Abban and Muhammad ibn Dawud al Zahiri on matters in which they differed with al Imam al Shafi'i.

Ibrahim ibn Ahmad al Marwazi (d 340) wrote *Al Umum wa al Khusus* "The General and the Particular" and *Al Fusul fi Ma'rifat al Usul*[57] "Chapters About Knowledge of Legal Source-Methodology".

Some of these scholars devoted their attention to producing commentaries on al Shafi'i's al *Risalah*; like Abu Bakr al Sayrafi (d 330), Abu al Walid al Nisaburi (d 365 or 363), Abu Bakr al Jawzaqi (d 388) and Abu Muhammad al Juwayni, the father of the famed Imam al Haramayn, teacher to al Imam al Ghazzali.

Commentaries on the *Risalah* are also attributed to five other scholars, namely: Abu Zayd al Jazuli, Yusuf ibn 'Umar, Jamal al Din al Afqahsi, Ibn Fakihani, and Abu al Qasim 'Isa ibn Naji. None of these commentaries, from which the scholars used to quote until after the seventh century, have come to light in modern times.

Shaykh Mustafa 'Abd al Razzaq[58] mentioned that the public library in Paris held a copy of al Juwayni's commentary on the *Risalah*, and quoted some parts of it. I, myself, have tried to locate this manuscript in Paris; but failed. Perhaps it had been placed with other books under a different heading or title. Probably, the only way to find it is to sift through all the manuscripts. That, however, is a daunting task, as the researcher would need to spend a great deal of time on the undertaking.

DEVELOPMENTS IN USUL AL FIQH AFTER AL IMAM AL SHAFI'I

What we have mentioned so far can hardly be regarded as development, as it mainly revolves around criticizing, supporting or commenting on the *Risalah*, and really goes no further than that. Once the discipline had been established, this state of affairs obtained until about the beginning of the fifth century AH, when what could be considered as significant development in the field began to take place.

During this period, al Qadi al Baqillani (d 402) and al Qadi 'Abd al Jabbar al Hamadani (d 415) undertook to re-write the whole subject of the practice and principles of Shari'ah Source Methodology, or *al Usul*.

In his book *al Bahr*, al Zarkashi wrote: "... the two judges, the *Qadi of Ahl al Sunnah*, Abu Bakr Tayyib al Baqillani, and the *Qadi of the Mu'tazilah*, 'Abd al Jabbar, came and expanded upon what had been written, clarified what had previously been little more than indications, provided detail to what had been mentioned in a general way, and removed ambiguities."

Al Qadi al Baqillani earned the title *Shaykh al Usuliyyin*[59] "Master of the Scholars of *al Usul*", after he wrote *al Taqrib wa al Irshad* "Clarification and Guidance". This hook has been lost for centuries; though it may yet turn up in one collection of manuscripts or another. In any case, the scholars of *al Usul* continued quoting from it until the ninth century AH.

For his part, al Qadi 'Abd al Jabbar wrote a book entitled either *al 'Ahd* "The Covenant" or *al 'Amad* "The Pillars" and wrote his own commentary on it.

Imam al Haramayn (d 478 AH) summarized al Baqillani's *al Taqrib wa al Irshad*, in a book entitled *al Talkhis* "The Summarizing" or *al Mulakhkhas* "The Summary", of which some pages are preserved in some manuscript collections. Later scholars of jurisprudence transmitted many of al Baqillani's ideas from this work.

Imam al Haramayn patterned his own book on *al Usul*, *al Burhan* "The Proof", on al Baqillani's *al Taqrib*, in that it included all fields of jurisprudence, was free in its method, and followed whatever evidence was available.[60] He disagreed with his teachers, al Imam al Ash'ari and al Imam al Shafi'i, on so many issues that many of his fellow scholars from the al Shafi'i school of legal thought rejected his commentary and did not give it the attention it deserved, even though they transmitted a great deal from it in their own books.

Two Maliki scholars, al Imam Abu 'Abd Allah al Maziri (d 536 AH) and Abu al Hasan al Abyari (d 616), wrote commentaries on *al Burhan*; and a third Maliki scholar, Abu Yahya, combined the two commentaries. Still, all three of these scholars dealt harshly, if not somewhat unfairly, with Imam al Haramayn because of what they considered to be his audacity in refuting al Imam al Ash'ari on matters where he disagreed with him, and in refuting al Imam Malik on the question of *al Masalih al Mursalah*. Imam al Haramayn added introductions to al Imam al Shafi'i's book which dealt with matters not found in the *Risalah*. He began by discussing the knowledge of those sources and concepts which anyone who wishes to study any science in depth must have. He explained that the sources of *Usul al Fiqh* were *'Ilm al Kalam* "Scholastic Theology", Arabic language and *Fiqh*. Then he dealt with legal judgements, duties, and competence, discussing in detail issues pertaining to various sciences, and explaining those which could be understood by reason, and which by religion. All the above matters formed an introduction to a discussion of the term *al Bayan*, "perspicuous declaration", the subject with which al Imam al Shafi'i began the *Risalah*.

It is quite apparent, however, when we see how Imam al Haramayn dealt with the subject of *al Bayan*, and with other of the subjects mentioned in the *Risalah*, that Imam al Haramayn defined the terms, including *al Bayan*, more precisely than al Imam al Shafi'i had done. He defined it, explained its essence, mentioned disagreements concerning it, and set forth its different categories. He also dealt with another matter which al Imam al Shafi'i had not dealt with, *Ta'khir al Bayan ila Waqt al Hajah* "Deferment of *al Bayan* until the time when it is Needed", and disagreements concerning it. Then, in discussing the different categories of *al Bayan*, he reiterated the five categories which al Imam al Shafi'i had mentioned, advocated Abu Bakr Dawud al Zahiri's comments on the subject, and then mentioned the other categories of *al Bayan* which some jurists had suggested.

Imam al Haramayn held the opinion that *al Bayan* meant "evidence", of which there are two types: *'Aqli* "rational" and *Sam'i* "received". The basis for "received" evidence is the miraculous Qur'an; so that the closer the evidence is to the Qur'an, the more precedence it has. Hence the order of priority in "received" evidence is: the Qur'an, the Sunnah, *al Ijma' Khabar al Wahid, al Qiyas*.

Then he dealt with languages, and explained that the scholars of jurisprudence have dealt with linguistic matters which the scholars of Arabic had omitted, such as *Awamir* "commands"; *Nawahi* "prohibitions", and *al 'Umum wa al Khusus* "the General and the Specific" which Imam al Shafi'i had dealt with.

In the course of this linguistic discussion, he mentioned some of al Baqillani's ideas, which clearly indicates that al Baqillani had already made these additions to al Imam al Shafi'i's methods.

When al Imam al Ghazzali was the student of Imam al Haramayn it was only natural that he be influenced by him. In fact, al Imam al Ghazzali wrote four books on the subject of *al Usul*. The first of these works was *al Mankhul* "The Sifted", a medium-sized volume written as though for beginners or intermediate level students of *al Usul*. Of the second book nothing is known except that it was referred to in *al Mustasfa*[61], and that its

title was *Tahdhib al Usul* "On the Refinement of Usul". The third book is entitled *Shifa' 'al Ghalil fi Bayan al Shibh wa al Mukhayyal wa Masalik al Ta'lil*, and was edited and published in Baghdad in 1390/1971. Al Imam al Ghazzali's Encyclopedia of Shariah Source Methodology, his fourth book on the subject, and his last word, was *al Mustasfa*, which has been printed several times in Egypt and elsewhere. Indeed, this is the work he wrote after coming out of his period of meditation and seclusion[62].

Al Imam al Ghazzali began his book with an introduction in which he covered nearly all of Aristotelian logic, a subject in which he had always been deeply interested. Then he wrote about the *Hadd* "Prescribed Punishment", about the conditions that must be satisfied before it can be applied, and about the different types of *Hudud*. He then discussed the *Dalil* "Evidence" and its various types.

At this point in the book, al Imam al Ghazzali proceeds to discuss the four poles of his work, headings under which everything in the field of *al Usul* is covered, and which his teacher, Imam al Haramayn, and predecessors, such as al Baqilani, were most concerned with. As his teacher had his own opinions that differed from those of al Imams al Shafi'i and al Ash'ari, so also did al Imam al Ghazzali hold opinions which differed from those of his predecessors. Likewise, among al Imam al Ghazzali's contemporaries there were those who accepted his views and those who did not.

These were the most important developments made by the followers of al Imam al Shafi'i in the field of Usul.

The second group to contribute to the development of the discipline were the *Mu'tazilah*. After al Qadi Abd al Jabbar had written his book, *al Amad or al 'Ahd*, and written a full commentary on it, he recorded some of his opinions on *al Usul* in his encyclopedia, some parts of which have been found and printed under the title *al Mughni*. The seventeenth volume of this encyclopedia was devoted to studies in *al Usul*.

As Imam al Haramayn concerned himself with the book of al Baqillani, so Abu al Husayn al Basri al Mu'taziuli (d 435 AH) concerned himself with the books of al Qadi 'Abd al Jabbar, and wrote a commentary on *al Amad/al 'Ahd*. When he felt that this commentary was too long, he summarized it in his well-known book al Mu'tamad "The Reliable", which is in print and widely available.

During this period, al Shaykh Abu Ishaq al Shirazi (d 476 AH) wrote his two books. *al Lam'* "The Bright Light" and *al Tabsirah* "Enlightenment", both of which are in print.

Al Qadi Abu Yahya al Farra' al Hanbali wrote a book on Usul entitled *al 'Uddah fi Usul al Fiqh* "The Tools of *Usul al Fiqh*", which was edited and published in Saudi Arabia in 1400/1980.

Ibn 'Aqil al Baghdadi, another Hanbali scholar, wrote *al Wadih Fi al Usul* "What is Clear in Usul".

Abu al Khattab wrote his well-known book, *al Tamhid* "The Preface", which was recently edited and published in Makkah.

Among the books written by scholars of the Maliki school of legal thought at that time was *'Uyun al Adillah Fi Masa'il al Khilaf Bayna Fuqaha' al Amsar* "Profusion of Evidence or Controversial Issues Among the Jurists of the New Muslim Settlements", by Ibn al Qassar al Baghdadi (d 398 AH), of which there is a copy at Qarawiyin University in Fez.[63] Al Shirazi considered this to be the best book by any *Maliki* scholar on the subject of juristic differences. Ibn al Qassar also wrote *Muqaddimah fi Usul al Fiqh* "Introduction to *Usul al Fiqh*", of which there is a copy at the Azhar University library.

The books of the *Shafi'iyah, Hanabilah, Malikiyah and Mu'tazilah* all followed a similar pattern in the order of their chapters and the treatment of their subject matter. Eventually, this pattern became known as "the method of the *Mutakallimun*."

THE ROLE OF THE FOLLOWERS OF ABU HANIFAH IN THE WRITING OF AL USUL

Some historians of *Usul al Fiqh* have suggested that al Qadi Abu Yusuf and Muhammad ibn al Hasan wrote about jurisprudence,64 but this claim has not been proven.

The author of *Kashf al Zunun*65 quoted 'Ala' al Din's saying from *Mizan al Usul* "Usul in the Balance":

"Know that *Usul al Fiqh* is a branch of *Usul al Din*; and that the composition of any book must of necessity be influenced by the author's beliefs. Therefore, as most of the writers on *Usul al Fiqh* belong to the *Mu'tazilah* who differ from us in basic principles, or to *Ahl al Hadith* who differ from us in questions of detail, we cannot rely on their books.

Our (Hanafi) scholars' books, however, are of two types. The first type is of books that were written in a very precise fashion, because their authors knew both the principles and their application. Examples of this type are: *Ma'khadh al Shar'* "The Approach of the Shari'ah" and *al Jadal* "Argument" by Abu Mansur al Maturidi (d 333 AH).

"The second type of book dealt very carefully with the meanings of words and were well-arranged, owing to the concern of their authors with deriving detailed solutions from the explicit meanings of narrations. They were not, however, skillful in dealing with the finer points of *al Usul* or questions of pure reason. The result was that the writers of the second type produced opinions in some cases agreeing with those with whom we differed. Yet, books of the first type lost currency either because they were difficult to understand or because scholars lacked the resolution to undertake such works."

There is much that could be said about how accurately this statement depicts the development of Hanafi studies of al Usul, even if it was made by a Hanafi. The statement does, nonetheless, come close to reality in explaining the role of the *Hanafi yah* in the development of *Usul al Fiqh*. In the first period, these scholars concentrated, even before al Imam al Maturidi, on discussing the issues brought up by al Imam al Shafi'i in his *Risalah*, as 'Isa ibn Abban and others did.

During the following period, one of the most prominent writers of *al Usul* was Abu al Hasan al Karkhi (d 340 AH). His book on *al Usul* consists of a limited number of pages that were printed with Abu Zayd al Dabusi's book, *Ta'sis al Nazar* "Establishing Opinion", which has been published in several editions in Cairo.

Then, Abu Bakr al Jassas (d 370 AH) wrote his work, *Al Fusul Fi al Usul* as an introduction to his *Ahkam al Qur'an* "Legal Interpretations of the Qur'an"66. *Al Fusul* has been researched and edited for a doctoral thesis, and was published recently in Kuwait.

True development of the *Hanafiyah* writing on the subject of *al Usul*. may be considered to have begun with al Imam Abu Zayd al Dabusi (d 340) who wrote two important books on the subject: *Taqwim al Adillah* "Appraising Evidence", all or some of which has been researched and edited, but which has not yet been printed, and *Ta'sis al Nazar*67. Abu Zayd made use of the work on *al Usul* done by his predecessors, especially that of Al Karkhi and Al Jassas, but with the difference that he expanded the field and explained it in greater detail; he also made brief reference to the points on which the *Hanafiyah* agreed and disagreed with others on matters of *Usul*.

Abu Zayd was followed by Fakhr al Islam al Bazdawi (d 482), who wrote the well-known *Kanz al Wusul Ila Ma'rifat al Usul* "A Treasury On Attaining Knowledge of the *Usul*", in which he dealt with *Usul* in general. Later *Hanafiyah* scholars took great interest in the book and wrote many commentaries on it; the best and most important of which was *Kashf al Asrar* "Secrets Uncovered" by 'Abd al Aziz al Bukhari (d 830). This commentary has been published in several editions in both Istanbul and Egypt.

Likewise, Shams al A'immah al Sarkhasi (d 423 AH) wrote *Usul al Sarkhasi*, which has been printed in two volumes in Egypt. This book is considered to be in many ways an alternate reading of al Dabusi's *Taqwim al Adillah*. The Hanafiyah scholars of *al Usul* took great interest in the books of al Bazdawi and al Sarkhasi, and concerned themselves with teaching and commenting upon them for a long time.

From the above it should be clear that the development of *Usul al Fiqh*, as a specialized discipline, had been completed, and that its issues and academic parameters had been defined by the fifth century AH. Indeed,

by that century, the scholars of every school of legal thought had recorded their own interpretations and understanding of *Usul al Fiqh*.

THE METHODS OF THE FOLLOWERS OF AL IMAM AL SHAFI'I OR, THE "MUTAKALLIMUN", AND THOSE OF THE HANAFIYAH

Writings on the subject of *al Usul* generally followed one of two methods. The first was al Shafi'i's method, or the method of the Mutakallimun. This was the method followed by the *Shafi'iyah*, the *Malikiyah, Hanabilah* and the *Mu'tazilah*68, and it was known as the "method of the *Mutakallimun*" because the authors of books written according to this method used to introduce them with discussions of theological and philosophical issues, such as *al Hasan* and *al Qabih* "The Good and the Reprehensible', *Hukm al Ashya' Qabl al Shar'* "The Legal Status of Matters Prior to the Revelation of Shari'ah", *Shukr al Mun'im* "The Necessity of Gratitude to the Bestower", and *al Hakim* "The Possessor of Sovereignty". A further reason for its being labeled "the method of the *Mutakallimun*" was the use of the deductive method in defining the principles of source methodology, in ascertaining the validity of those principles, and in refuting those whose opinions differed without paying much attention to the issues and details which stem from the application of these principles.

THE METHOD OF THE HANAFI SCHOLARS OF AL USUL

The Hanafi method of writing on *al Usul* involved defining the principles of *Usul* from the details of legal issues with which their earliest predecessors had already dealt. Thus, the basis for their studies of *al Usul* was derived from the details of previously settled legal issues, and not the other way round. Therefore, one who studies *Usul al Fiqh* according to this method will gather the details of issues concerning which the Hanafi Imams have already given *Fatawa*, and then analyze them. Through his analysis he will decide the basis on which these *Fatawa* were given.

Shah Wali Allah of Delhi commented:

"I found that some of them claimed the differences between Abu Hanifah and al Shafi'i were founded on the *Usul* mentioned in al Bazdawi's book and elsewhere. But the truth is that most of these *Usul* were themselves derived from the differing legal pronouncement of the Imams. My opinion of the matter is that such principles of *al Usul* as the rules which say that the specific "*al Khass*" is obvious "*Mubayyan*", and does not need to be followed by a declaration "*Bayan*"; that the addition of details to a text constitutes abrogation "*Naskh*"; that the comprehensive "*al 'Amm*" is definitive "*Qat'i*" like the specific "*al Khass*"; that mere numbers of narrations may not be taken as a factor in according preference *Tarjih* to one opinion or another; that the Hadith of one who is not a *Faqih* need not necessarily be adopted in cases where there can be no resort to reason; that there is no legitimacy to the notion of progressing from a precondition "*Shart*" or description "*Wasf*" to a legal deduction; that the imperative "*al Amr*" in a text always indicates legal obligation "*Wujub*"; and so on, all of these are examples of principles inferred from the judgements of the Imams. Indeed, there are no sound narrations to suggest that Abu Hanifah or his two companions, Muhammad and Abu Yusuf, adhered to any of these principles of source methodology. As such, then, these principles deserve no more to be preserved and defended, as al Bazdawi and the others did, than the opposing principles do."69

THE SCIENCE OF USUL AL FIQH DURING THE SIXTH CENTURY AH AND THE FOLLOWING PERIOD

Following the consolidation of the subject matter of this discipline, according to the method of the *Mutakallimun*, in four major works: *al 'Ahd, al Mu'tamad, al Burhan and al Mustasfa*, two great scholars from among the *Mutakallimun* summarized these four books in works of their own.

The first was al Imam Fakhr al Din al Razi (d 606 AH), who summarized them in his book *al Mahsul* "The Sum and Substance", which I had the honour of researching and editing. This work has been printed in six volumes by Imam Muhammad ibn Sa'ud University, and is now being reprinted.

The second was al Imam Sayf al Din al Amidi (d 631 AH), who summarized these four books in his *al Ihkam Fi Usul al Ahkam* "Precision in the Source Methodology of Law", which has been published in Riyadh, Cairo and elsewhere.

These two books are lengthier and certainly easier to read and understand than others. Of the two, *al Mahsul* is written in clearer language, and is more detailed in its explanations. Many glosses and commentaries have been written on these two books. Taj al Din al Armawi (d 656) summarized *al Mahsul* in his book *al Hasil* "The Outcome", which was researched and edited for a doctoral thesis at al Azhar University, but has not yet been published.

Al Imam al Razi himself also summarized it in a book entitled *al Muntakhab* "Selections", which one scholar has researched and edited.

Al Qadi al Baydawi (d 685) summarized *al Hasil* in his book *Minhaj al Wusul Ila 'Ilm al Usul* "The Way of Mastering the Science of Source Methodology"; but his summary was so abbreviated that the result is like a riddle, very difficult to understand. Thus, many scholars undertook to produce commentaries on the book. Among such commentaries, the best is that of al Isnawi (d 772), which is entitled *Nihayat al Su'l* "An End to Questioning" This book occupied the attention of the scholars in the field for a long time, and the *Shafi'iyah* scholars al Al Azhar are still devoted to it.

Al Amidi's book, *al Ihkam* "Precision" was summarized by Ibn al Hajib (d 646) of the Maliki legal school in his book *Muntaha al Su'l wa al Aml Fi 'Ilmay al Usul wa al Jadal* "The Ultimate in the Sciences of Jurisprudence and Argumentation", which is well-known among the followers of al Imam Malik.

The best available commentary on this work is that of 'Udad al Din (d 756), for which several glosses and commentaries have been written.

All of these books were written following the method of the *Mutakallimun*, defining the principles, basing evidence upon them, and seeking to refute by means of these those who held opposing views, until one of the two groups admitted defeat.

The *Hanafiyah* scholars of *al Usul* were likewise occupied in studying the books of al Bazdawi and al Sarkhasi. This situation remained the same until the end of the sixth century and the beginning of the seventh century AH, when the scholars of *at Usul* began using a new method. This method involved combining the methods of the *Mutakallimun* and the *Hanafiyah* scholars so as to produce books which combined the *Usul* of the two groups.

Following this method, Muzaffar al Din al Sa'ati (d 694) wrote *Bad'i al Nizam al Jam'i Bayna Kitabay al Bazdawi wa al Ihkam*. This book is one which is readily available in print.

Sadr al Shari'ah (d 747) wrote *Tanqih al Usul* "Refining *al Usul*", in which he summarized *al Mahsul, Usul al Bazdawi* and *Mukhtasar ibn al Hajib*. He then wrote a commentary on his own book entitled *al Tawdih* "Clarification", to which al Taftazani (d 792) added a marginal commentary entitled *al Talwih*. All three books, *al Tanqih, al Tawdih* and *al Talwih* are available in print.

Among the *Shafi'iyah* scholars, Taj al Din al Subki wrote his famous book, *Jam' al Jawami'* "The Compilation of the Comprehensive". In the introduction, he mentioned that he had compiled his work from one hundred different books on *al Usul*. Many scholars wrote commentaries and added footnotes to al Subki's book. Of these, perhaps the most important and most widely-available commentary is *Sharh al Jalal al Muhalli*, which remains even today the basis for studies in *al Usul*, especially for the *Shafi'iyah* scholars.

Badr al Din al Zarkashi (d 794) also wrote a commentary, entitled *Tashnif al Masami'* "To Please the Ears", part of which was printed in Cairo with footnotes by al Shaykh al Muti'i (d 1354). One of the students at Imam Muhammad ibn Sa'ud University has researched and edited part of this book recently for his doctoral thesis.

Al Zarkashi also wrote *al Bahr al Muhit* "The Vast Ocean", in which he collected the submissions of scholars of al Usul from over one hundred books. A student has stared to research and edit this book, under our supervision, for his doctoral thesis, and has already completed one volume and made it ready for publication.

Among the *Hanabilah*, Ibn Qudamah (d 620) wrote *Rawdat al Nazir wa Jannat al Manazir*, in which he summarized al Ghazzali's *al Mustasfa*, and added to it other useful material on matters in which the *Hanabilah* disagreed with others. This book has been printed several times, and the *Hanabilah* took great interest in it, to the extent that they ignored nearly all other books.

Sulayman al Tufi (d 716) summarized this work, and then commented upon his summary in two volumes.

Among the *Malikiyah*, al Qarrafi (d 684) wrote *Tanqih al Fusul fi Ikhtisar al Mahsul* "Refining Chapters in Summary of the *Mahsul*". Al Qarrafi also wrote a commentary on *al Mahsul* in a large volume entitled *Nafa'is al Usul* "Treasures of the *Usul*", part of which has been researched and edited under our supervision in Riyadh.

CHAPTER SIX

ISSUES RELATED TO IJTIHAD

The subject of Ijtihad traditionally took up an entire chapter of a book of *al Usul*. In that chapter, the author would first deal with Ijtihad by defining it, explaining the conditions for its validity, and differentiating between the various kinds of Ijtihad. Thereafter, he would discuss whether or not the Prophet (PBUH) considered Ijtihad to be a form of worship *'Ibadah*, whether or not it constituted a form of *'Ibadah* for the *Sahabah* during the Prophet's lifetime, whether only one answer resulting from Ijtihad on any issue could be correct, or whether there could be several correct answers, and when Ijtihad was and was not permitted. Then the scholars dealt with the subject of *Taqlid* in the same fashion.

In the eighth century AH, Ibrahim ibn Musa al Shatibi (d 790) wrote *al Muwafaqat* "The Congruences", in which he spoke of Ijtihad in terms of its being an intellectual exercise based on two pillars. The first pillar was complete knowledge of the grammar and syntax of the Arabic language. He left this subject to the scholars of the Arabic language and other writers on *al Usul*. The second pillar of Ijtihad, in al Shatibi's opinion, was knowledge of the purposes behind the legislation of the All-Wise Lawgiver.

Al Shatibi's predecessors in the field of *al Usul* had never paid a great deal of attention to these purposes. Rather, the most they had done in this direction had been to search for principal causes *'Illah*. Al Shatibi, on the other hand, wrote his book in order to deal with this important matter. Indeed, knowledge of the purposes *Maqasid* of the Shari'ah is essential to understanding the legislation of the Lawgiver. Yet, the scholars of *al Usul* have never given this book the attention it deserves. This may perhaps be explained by the notion fixed in the minds of many scholars that it is not permitted to seek reasons for legislation by the Almighty, for the reason that such speculation cannot be regulated or rendered precise.[70] When this is the case, or so goes the reasoning of a great many scholars, the study of such matters is little more than a needless intellectual luxury.

Anyway, al Shatibi's book is in print and widely available; and we can only hope that teachers of *al Usul* and those responsible for drawing up curricula will direct their students' attention to this important work; especially those who are studying *al Qiyas,al Ta'lil* and Ijtihad. In our own times, the two great scholars, Ibn 'Ashur and 'Allal al Fasi have written on the subject of the purposes of the Shari'ah.

Ibn Humam (d 861) wrote *al Tahrir* "The Writing", and his student, Ibn Amir al Hajj (d 879) wrote a commentary on it entitled *al Taqrir wa al Tahbir*. Both are in print. *Al Tahrir* is one of the books written in the combined *Hanafiyah- Mutakallimun* method. There is another commentary, by Amr Badshah, entitled *Taysir al Tahrir* "Facilitating the Writing".

Al Qadi 'Ala' al Din al Mardawi (d 885) wrote a summary of *Usul Ibn Muflih*[71] (d 763) entitled *Tahrir al Manqul wa Tahdhib 'Ilm al Usul*. This work has been researched and edited, and is due to be published soon. The same researcher has also dealt with *Usul Ibn Muflih*.

Later, Ibn al Najjar al Futuhi of the Hanbali school of legal thought wrote a summary of *Tahrir al Mardawi*, and wrote an excellent commentary on it. This commentary is considered to be one of the best and most comprehensive of the later books about *al Usul*. An incomplete version of the book was printed in Egypt before it was researched and edited by two prominent professors, Dr. Nazih Hammad and Dr. Muhammad al Zuhayli. Their work was published by the Center for Academic Research in the College of Shari'ah at Makkah. Most of the book has now been published, and what remains is at the press.

In the twelfth century AH, Muhibb Allah ibn 'Abd al Shakur al Bihari, of the Hanafi school (d 1119 AH) wrote his famous book on *Usul, Musallam al Thubut*. This is one of the most precise and comprehensive books written by the later generation of *Hanafi* scholars. The book has been printed on its own, and with a commentary, in India; and has also been printed, with its famous commentary *Fawatih al Rahamut*, on the margin of al Imam al Ghazzali's *al Mustasfa*, several times.

All of these books were written following the methods mentioned above, and all of them concentrated on supporting their author's *Madhab* and refuting those of his opponents. From the sixth century until the

present, there is no book to be found which is concerned with presenting *Usul al Fiqh* as a research tool that will protect the Muslim jurist from making errors in Ijtihad; apart from one remark made in passing by al Shaykh Mustafa Abd al Razzaq in his book *Tamhid li al Tarikh al Falsafah al Islamiyah* "Preface to the History of Islamic Philosophy". His student, Dr. Nashshar, tried to explain this remark in his book *Manahij al Bahth* "Methods of Research".

In the thirteenth century AH, al Qadi al Shawkani (d 1255) wrote his well-known book on *Usul, Irshad al Fuhul* "Guidance of the Masters". This book, despite its diminutive volume, presents different opinions in the field of *al Usul*, and the evidence given by the proponents of each, in a brief but excellent fashion. The author also states which of the opinions he prefers. This book, which has been printed several times is a useful one for the student of *Usul al Fiqh* and comparative studies in jurisprudence. However, to the best of our knowledge, it has not been included in the curriculum of any institute, despite its suitability.

Muhammad Siddiq Khan (d 1307) summarized this work in a book entitled *Husul al Ma'mul min 'Ilm al Usul* "The attainment of the Hoped For in the Science of *al Usul*", which is in print.

Indeed, *Irshad al Fuhul* is considered to be an accurate summary of al Zarkashi's *al Bahr al Muhit*; and al Mahallawi's *Tashil al Usul* is considered to be a summary of *Irshad al Fuhul*.

After this period, we find that the study of *al Usul* has followed either one of two major trends:

1. Writing study guides, summaries and notes. This has been done by the professors at various colleges of Shari'ah and Law in order to make the study of *Usul al Fiqh* easier for their students; after they realized that their students were unable, or unwilling, to study this subject. Certainly, these notes represent no sort of advance in the field; and in most cases they are mere attempts at recasting the issues of *Usul al Fiqh* in a simplified modern idiom. The following scholars, al Marsafi, al Mahallawi, al Khudari, Abd al Wahhab Khallaf,al Shinqiti, al Sayis, Mustafa 'Abd al khaliq, 'Abd al Ghani 'Abd al Khaliq, Abu Zahrah, Abu Nur Zuhayr, Ma'ruf al Dawalibi, 'Abd al Karim al Zaydan, Zaki al Din Sha'ban, Muhammad Sallam Madkur, and others, all wrote books which were originally lectures they had delivered in the colleges of Law and Shari'ah where they taught.
2. The second trend has been the writing of university theses on different aspects of this science, and the researching and editing of unpublished manuscripts. Undoubtedly, both aspects of this trend are of great benefit, and I certainly do not intend to demean the efforts of anyone; but these nonetheless fall short of achieving any sort of development in the field, and the science of *Usul al Fiqh* remains in the same place our predecessors left it in the sixth century AH.

From the above, we may draw the following conclusions:-

1. Nothing of the discipline now known as *Usul al Fiqh* had emerged, with its particular terminology, during the time of the Prophet (PBUH) or his Sahabah.

Nonetheless, almost all of the various Ijtihad processes employed during these two periods could be classified under the principles articulated by this science. The reason for this is that they used to derive detailed legal rulings on particular issues from the sources of law as a matter of instinct, just as they used to speak Arabic instinctively, or without being aware of the grammatical rules which were still unknown at the time.

2. The first scholar to compile a book about the principles of the science of *Usul al Fiqh* was al Imam Muhammad ibn Idris al Shafi'i (150-204 AH).

The first comprehensive book on the subject was the *Risalah*, which he wrote in response to a request from al Imam 'Abd al Rahman ibn al Mahdi (135-198 AH). This was after the two famous schools of Fiqh, the school of *Ahl al Hadith*, led by al Imam Malik ibn Anas (93-179 AH), and the school of *Ahl al Ra'i*, led by al Imam Abu Hanifah (70-150 AH), had become established and widespread.

Following the widespread circulation of these two legal schools of thought, there arose between the followers of these two schools, in addition to the political, theological and philosophical conflicts of the period, what can be described as "The Fiqh Controversy".72

3. *Usul al Fiqh* is a method of research for the jurist,73 and its place in Fiqh is analogous to that of Logic in Philosophy.74 Therefore, it was defined as "the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to certain knowledge of a Shari'ah ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer."75

So, *Usul al Fiqh* offers comprehensive guidelines which protect the *Mujtahid* from making mistakes in the various ways he uses source material for the purpose of deriving legal judgements.76 Nonetheless, it was not used in this way until al Imam al Shafi'i put it to use in his "New" Fiqh.77

4. An important fact which should be borne in mind is that scholars studied *Fiqh*, and made pronouncements concerning it, before anyone began to speak of its *Usul* (apart from al imam al Shafi'i in his "New" Fiqh).

Thus, the role given by others to *Usul al Fiqh* was little more than that of justification for legal pronouncements *Fatawa* that they made on specific issues, and of the substance of argument and debate among them. They did not view *Usul al Fiqh* as a comprehensive legal guideline, or as a methodology capable of regulating the entire legal system. The jurists *Fuqaha*, when faced with questions and situations, used to refer these back directly to the relevant evidence, without feeling the need to have recourse to the general principles articulated in *Usul al Fiqh*.

So, al Imam Abu Hanifah gave *Fatawa* on nearly half a million issues,78 which his students learnt and passed on. But, the legal principles on which al Imam Abu Hanifah based these *Fatawa* were never transmitted with anything like an uninterrupted line of authority from him,79 apart from a few reports in which he refers to some of the sources of his Ijtihad. He said, in one of those reports:

"I follow the book of Allah, and if I find no solution there, I follow the Sunnah of the Prophet, peace be on him. If I find no solution in either the Qur'an or the Sunnah, I follow whichever of the pronouncements of the *Sahabah* I prefer, and leave whichever I wish. If there is a pronouncement on a particular matter by any of the *Sahabah*, I would not adopt any other opinion made by any other scholar. But, if I found a solution only in the opinions of Ibrahim, al Sha'bi, Ibn Sirin, Hasan al Basri, 'Ata' or Sa'id ibn al Musayyab, I would make Ijtihad just as they did."80

When some people tried to turn the *Khalifah*, al Mansur, against him, Abu Hanifah wrote to the *Khalifah*:

"The situation is not as you have heard, *0 Amir al Mu'minin*! I work according to the Book of Allah, then according to the Sunnah of the Prophet, then according to the judgements of Abu Bakr, 'Umar, 'Uthman and 'Ali, then according to the judgements of the rest of the *Sahabah*. Then, if there are any differences between their pronouncements, I resort
to *al Qiyas*. No one of Allah's creatures is inherently closer to Him than any other."81

When he was accused of preferring *al Qiyas* to an explicit text *Nass* in the Qur'an, he replied: "By Allah, those who say that we prefer *al Qiyas* to a *Nass* have lied and slandered us. Is there any need for *al Qiyas* after [finding an explicit] *Nass*?"82

5. It is quite obvious that from the beginning of the Umawi period until the destruction of the Islamic *Khilafah*, authority and leadership in the Ummah were in the hands of those who were not qualified to perform Ijtihad, whilst the responsibility for Ijtihad passed to the *'Ulama'* who had no authority. And it is difficult to find exceptions to this state of affairs, apart from the *Khilafah* of 'Umar ibn 'Abd al 'Aziz, from whom many judgements involving questions of jurisprudence have been narrated. This situation had the far-reaching effect of separating *Fiqh* and its *Usul* from the practical aspects of Muslim life, so that in many cases these subjects became theoretical and idealistic.83 Essentially, both subjects became descriptions of how Muslim life ought to be; not how it really was, or what it might become.

6. The writers and historians of this science classified it among the sciences of the Shari'ah that are based on transmitted evidence,[84] even though some writers said that its principles are taken from the Arabic language, the rational sciences, and certain other Islamic disciplines.[85] One of the most prominent writers in the field, al Imam al Ghazzali, wrote:

The noblest sciences are those in which reason *'Aql* and received evidence *Sama'* are married, and in which conclusions based on reason accompany those based on revelation. The science of Fiqh and its *Usul* is one of these sciences. It draws equally from the purity of revelation and the best of reason. Yet, it does not rely purely on reason in a way that would be unacceptable to revealed law, nor is it based simply on the kind of blind acceptance that would not be supported by reason.[86]

The statements of al Imam al Ghazzali and other writers on the subject of *al Usul* enable us to suggest that there are three sources of Fiqh:

i. *Wahy* Divine revelation: this includes both the recited, or the inimitable Qur'an, and the unrecited, or the Sunnah.
ii. *'Aql* or reason: to explain the texts, to seek ways in which they may be applied and ways in which various parts may be connected to the whole, to search for the reasons behind legislation that seems to have no reason, to derive laws in matters for which the Lawgiver did not lay down an explicit judgement in the texts, and other similar matters which can be defined and explained.
iii. Experience, customs and the public interest.

All the *Usul*, both those which scholars have agreed upon and those concerning which there are disagreements, may be classified under the above three headings, as follow: The Qur'an, the Sunnah, *al Ijma', al Qiyas*, the idea that what is basically beneficial is permitted and what is basically harmful is prohibited, *al Istishab* and *al Istihsan*. In addition, the pronouncements of the *Sahabah* which were well-known among them and which none of them opposed; the principle of always adopting the least rigorous alternative; studying a few of the available relevant cases for purposes of comparison; common interest and customs which were neither commanded nor prohibited in any Islamic source; the conclusion that there is no law when there is nothing to indicate any law; the laws of nations before Islam, and closing the door on justifications.

7. There were certain factors in our history, some of which were mentioned above, that both intimidated and imposed many restrictions upon us. Thus, the focus of our Islamic mentality and intellectual attention was diverted to minor issues, so that we were distracted from thinking in comprehensive terms, characteristics considered to be the distinguishing features of Islamic thought. This had a far-reaching effect on the way we dealt with Fiqh and on the solutions we produced, in that these also bore the same characteristics and features.

8. It is well-known that in every science and sphere of life, there are some matters that naturally accept development, that sometimes require it in order to realize their full potential. Yet, there are other matters that are fixed and immutable. According to the logic of Islam, the two must be integrated. Hence *Usul al Fiqh* has fixed rules which cannot be changed, and others which rely on continual development and renewal. This is clear from the foregoing discussion of Ijtihad.

Hence, while we urge all Muslim scholars not to begin from a vacuum, but to benefit from the reasoning and Ijtihad of the scholars who went before them, we affirm that no one can claim that it is obligatory to follow any *Mujtahid* in matters where his pronouncements were based solely on his individual reasoning. The best we can say in this matter is that his pronouncements are "an opinion, and an opinion can be shared."[87]

9. From studying the methods of the early Muslims, it is clear to us that their aim was not simply to ascertain the law and then to produce *Fatawa*. On the contrary, their objective was always the establishment of Allah's rule through the application of His law. What this means, essentially, is that the circumstances surrounding the application of law cannot be separated from the conditions attached to it.

If, having understood the above, we wish to restore this science to its rightful place among the Islamic sciences, and transform it into a method of research into the source evidence of the Shari'ah from which we

may derive rulings on, and solutions to, our contemporary problems, (thus maintaining the sovereignty of the Shari'ah), we must do the following:

i. Review the topics covered by this science, and eliminate those without relevance to the modern scholar or jurist. These might include, *Hukm al Ashya' Qabl al Shar"* "Rulings before the Shari'ah", *Shukr al Mun'im* "How one is required to thank the Almighty Bestower", *Mabahith Hakimiyyat al Shar'* "Studies about the Sovereignty of the Shari'ah", and excessive concern with definitions. We should also dispense with disputes concerning the uncommon *Qira'at Shadhdhah* "Alternate Recitations" of the Qur'an, and the Arabic nature of the entire Qur'an. Likewise, we should now end the long disagreement about single-narrator Hadith by saying that if such a narration is proven to have met the conditions of being authentic *Sahih* it will be acceptable, and laws may be derived from it.

Moreover, we should re-examine all the conditions, laid down by certain early jurists, that seem to have been dictated by circumstances. For example, the condition that a Hadith should not contradict the general principles they established, that it should not be narrated by other than a *Faqih*, that it should not contradict *al Qiyas*, or the traditions of the people of Madinah, or the explicit meaning *Zahir* of the Qur'an. Or the condition that a Hadith, if it deals with a common issue or hardship or affliction, must be widely known. All of these conditions should be rejected, and the same must be done with other conditions which were and are still controversial and a source of disagreement among Muslims, and which still occupy the time of scholars.

ii. Undertake linguistic studies relating to Fiqh which will examine the styles of expression used by the Arabs at the time of the Prophet (PBUH), and note the stages of development which these styles later passed through, and the various meanings assigned to words in current usage at the time. This will enable us to understand the texts as they should be understood.

iii. Pay special attention to the methods and the principles involved in performing Ijtihad, such as *al Qiyas*, *al Istihsan, al Maslahah*, and others, and study them from a historical perspective, taking into account the circumstances which dictated the pronouncements of the *Mujtahidun*. We should also try to instil a juristic frame of mind into those who are researching in the fields of *al Fiqh* and *al Usul*.

iv. Realize that it is impossible at this time for there to be a *Mujtahid Mutlaq*, or one who is a legal authority (on the interpretation of the sources) in his own right, to pass judgements on issues. As long as this is so, academic councils are the best alternative.

In order to enable these councils to meet the needs of the Ummah in matters of legislation, they should be composed of experts whose specializations cover all aspects of life, and who would be able to clearly perceive any problem presented to them. In addition to this, they would have to have complete knowledge of the general rules and principles of the Shari'ah of Islam. Such councils would also include jurists of the highest level possible, knowledgeable in both the sciences of the Shari'ah and the detailed source evidence. Perhaps one of our great jurists was referring to this idea when he was approached by someone who wanted to break his fast in the month of *Ramadan* and the jurist told the man to seek the opinion of a trustworthy Muslim doctor; adding that if the doctor considered the fast injurious to his health, then it would be permissible for him to abstain.

v. We must make it easier for specialists in other fields to study what they need of the sciences of the Shari'ah.

vi. We must become familiar with the Fiqh of the *Sahabah* and *Tabi'un*; and especially with the principles on which they derived their judgements. In particular, the Fiqh of the *Khulafa' Rashidun* and their contemporaries deserves deep study. Then, this knowledge may be presented to those whose task it is to formulate legislation and make judgements in response to the demands of contemporary Muslim society.

vii. We need to take an interest in knowing the aims and purposes of the Shari'ah, and in developing the study of this matter, by setting down rules and guidelines.

And Allah is the Giver of *Tawfiq* (success and prosperity)!

ABOUT THIS BOOK

Usul al Fiqh is a science in which reason and revelation come together, where considered opinion is accompanied by received law. Yet, ***al Usul*** does not rely purely on reason in a way that would be unacceptable to revealed law, nor is it based simply on the kind of blind acceptance that would not be supported by reason. Hence, the science of **Usul al Fiqh** has been called the "Philosophy of Islam".

This book is an attempt to simplify **Usul al Fiqh** and introduce it to specialists in the social sciences and humanities who do not have the opportunity to study the details of the science considered to be the most important method of research produced by Muslim thought during its most creative period.

The International Institute of Islamic Thought presents this work as the first in a new series of academic research to be made available to a wide readership of students, educated Muslims, and scholars of Islamic knowledge.